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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners, The Greyhound Corporation and Greyhound Lines, Inc. ("Greyhound"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 9, 1977. That judgment and opinion affirmed a $14,400,000 judgment in favor of Respondent Mt. Hood Stages dba Pacific Trailways ("Mt. Hood") entered by the United States District Court for the District of Oregon.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 555 F.2d 687; a copy is attached hereto as Appendix A. The Court of Appeals' order denying Greyhound's Petition for Rehearing with Suggestion for Rehearing *en Banc* is unreported; a copy is attached

as Appendix B. There is no reported decision of the District Court. Copies of its memoranda and orders denying Greyhound's post-trial motions and concerning attorneys' fees are attached as Appendix C and Appendix D, respectively.

JURISDICTION

The Court of Appeals' judgment was entered on June 9, 1977. A timely Petition for Rehearing with Suggestion for Rehearing *en Banc* was denied on August 3, 1977. (App. B) This Petition is being filed within 90 days of that date. This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. This action involves a private antitrust attack on Greyhound's acquisition of bus companies and on the manner in which Greyhound operated the acquired companies. The acquisitions were approved by the Interstate Commerce Commission ("ICC") as being in the public interest under Section 5(2) of the Interstate Commerce Act, and the manner of Greyhound's subsequent operation of the acquired companies was subject to comprehensive ICC regulation. Paragraph (12) of Section 5 of the Interstate Commerce Act provides that:

> "The authority conferred by this section shall be exclusive and plenary . . . any carrier . . . participating in . . . any transaction approved . . . shall be and they are relieved from the operation of the antitrust laws . . . insofar as may be necessary to enable them to carry into effect the transaction . . . and to hold, maintain, and operate any properties and exercise any control . . . acquired . . . ." 49 U.S.C. § 5(12).

Do Section 5(12) and applicable principles of antitrust law permit a treble damage award of $14,400,000 to be based upon a jury's application of antitrust standards to acquisitions approved

by the ICC and to the manner of operation of the acquired companies which is subject to the ICC's "exclusive and plenary" regulatory authority under the Interstate Commerce Act?

2. In 1947 and 1957 Greyhound entered into consent decrees with the Justice Department. Those decrees expressly negate any admission that Greyhound violated the antitrust laws, and they were entered before any testimony was taken. The Court of Appeals affirmed the District Court's admission of those decrees into evidence on the ultimate issues under the Sherman Act. Section 5(a) of the Clayton Act provides that:

> "A final judgment or decree . . . in any civil or criminal proceeding brought by . . . the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party . . . : *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken . . . ." 15 U.S.C. § 16(a).

One purpose of that statute is to encourage the use of consent decrees which are crucial to the Justice Department's antitrust enforcement program.

Does Section 5(a) of the Clayton Act permit a jury to base a finding of violation of the Sherman Act on consent decrees which expressly deny any antitrust violation and which were entered before any testimony was taken?

3. On October 7, 1964, Mt. Hood petitioned the ICC to reopen certain ICC proceedings involving Greyhound's acquisition of several bus companies. On December 14, 1964, the United States filed a petition for leave to intervene in the ICC proceedings. Its petition made no charges and sought no relief. The Court of Appeals held the filing of that petition tolled the statute of limitations from the date it was filed and before it was granted. The Clayton Act, 15 U.S.C. § 16(i), provides that:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private . . . right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended . . . ." 15 U.S.C. § 16(i).

The Department of Justice participates and expresses its views in a wide variety and a large number of administrative proceedings.

Does Section 16(i) toll the statute of limitations every time the Department of Justice files a petition for leave to intervene in an administrative proceeding instituted by another even though the petition complains of nothing and seeks no relief?

4. This action was commenced twenty-five years after Mt. Hood's cause of action accrued. It was based upon conduct that Mt. Hood knew and continuously complained about during the entire twenty-five years. Section 4B of the Clayton Act provides that:

> "Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b.

Is Section 4B tolled by fraudulent concealment? If so, did the Court of Appeals properly hold that the statute was tolled for alleged fraudulent concealment because Greyhound had denied it did what Mt. Hood kept complaining it had done?

STATUTES INVOLVED

The statutes involved are 15 U.S.C. §§ 15b, 16(a), 16(i) and 49 U.S.C. § 5. Pertinent portions are quoted in connection with the questions presented. They are set out verbatim in Appendix E.

STATEMENT OF THE CASE

This is a private antitrust action brought by Mt. Hood against Greyhound in the District Court for the District of Oregon under Section 4 of the Clayton Act, 15 U.S.C. § 15.

Mt. Hood and Greyhound Lines, Inc., are motor common carriers of passengers and express, operating under authority from and regulation by the ICC. Mt. Hood's principal routes run between Portland, Eugene and Albany, Oregon, in the West and Salt Lake City, Utah, in the East, and between Klamath Falls, Oregon, in the South and Biggs and The Dalles, Oregon in the North.[1]

Greyhound Lines, Inc., is wholly owned by The Greyhound Corporation, a diversified holding company. *See California Parlor Car Tours Co.*, 93 M.C.C. 392 (1963). (R. 1937-1939) Greyhound Lines has routes serving Portland, Eugene, Salt Lake City, Klamath Falls, Biggs and The Dalles over which it competes with Mt. Hood. Between 1947 and 1954, Greyhound acquired ownership and control of eight bus lines in the western United States, every time with ICC approval. The lines became part of Greyhound's integrated nationwide system of intercity bus transportation which the ICC fostered. *See Greyhound Corp.*, 1 M.C.C. 77, 80-81 (1936); *Greyhound Mergers*, 1 M.C.C. 342, 346-347 (1936); C. Fulda, *Competition in the Regulated Industries, Transportation*, § 5.36 (1961).

Mt. Hood formally protested five of the acquisitions, contending that Greyhound refused to turn passengers over to Mt. Hood that it could handle itself, that the acquisitions would deprive it of connections and would impair the competitive situation and that

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1. Since 1943, Mt. Hood has done business as "Pacific Trailways" and has been a member of the National Trailways Bus System which consists of some 50 bus companies associated together for the purpose of competing with Greyhound. Mt. Hood connects with Trailways companies at Portland, Salt Lake City, Albany and Eugene and features through service over their lines. (Tr. 3845-3849, 3912-3913, Ex. K-13; *Transcontinental Bus System, Inc.*, 59 M.C.C. 233, 235 (1953); *National Trailways Bus System*, 75 M.C.C. 179, 182 (1958))

Greyhound would have the power to extinguish it. (*See* Tr. 3500-3505, 3509-3511, 3513-3515) Notwithstanding these protests, the ICC approved the acquisitions, holding that they would benefit Greyhound and the public by producing economies, coordination and improvement of service, and that "[e]ven if some restraint of competition should result, we may approve the transactions if they are otherwise consistent with the public interest . . . ." *The Greyhound Corp.*, 50 M.C.C. 123, 140 (1947) (R. 1862);[2] *See also The Greyhound Corp.*, 58 M.C.C. 809 (1952) (R. 1895-1904); *The Greyhound Corp.*, 45 M.C.C. 821 (1947); *The Greyhound Corp.*, 55 M.C.C. 801 (1948); *The Greyhound Corp.*, 55 M.C.C. 321 (1948); *The Greyhound Corp.*, 59 M.C.C. 657, 668-670 (1953); *The Greyhound Corp.*, 60 M.C.C. 643, 650-653 (1954).[3]

After unsuccessfully protesting to the ICC against most of the relevant Greyhound acquisitions, Mt. Hood continued to complain about the manner in which Greyhound was quoting service and routing passengers over the acquired lines. From 1955 on, Mt. Hood repeatedly complained that Greyhound was doing precisely what it complained Greyhound had done in this case: that it had instructed its agents in Oregon not to quote Mt. Hood's service, that it was not routing traffic over Mt. Hood's lines, that these practices violated assurances Greyhound had given to the ICC in the acquisition cases and that Greyhound was violating the antitrust laws. (Exs. 197, 215, 289, 297, 303-A, D-12)

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2. In 1943, Mt. Hood had successfully applied to the ICC for an extension of its own routes from Boise to Salt Lake City, on the ground that it needed to reach Salt Lake City to secure "friendly connections" because Greyhound-affiliated carriers would not route passengers over its lines. (*See* Tr. 3400-3407, 3832-3834, 3836) The ICC granted the authority, acknowledging that Mt. Hood's competitors could not be expected to quote its service and route passengers over its lines. *Mt. Hood Stages, Inc.*, 44 M.C.C. 535, 542-544, 547-550 (1945).

3. The relevant opinions and orders are in the record. Tr. 2197; R. 1844, *et seq.*

Greyhound terminated a joint through bus arrangement with Mt. Hood effective September 8, 1964. Mt. Hood immediately petitioned the ICC under Section 5(10) (formerly 5(9)) of the Interstate Commerce Act, 49 U.S.C. § 5(10), to reopen the acquisition cases. It sought modification of the earlier approval orders, restoration of the joint through bus, enforcement of representations and assurances alleged to have been made by Greyhound in the acquisition cases and relief against alleged destructive competitive practices—again the very practices about which it complained in this case. (R. 1402, 1419) On May 27, 1965, the United States was given permission to intervene in the ICC proceeding. The ICC rendered its decision in 1968, finding that the acquisitions had been approved as consistent with the public interest and that Greyhound had been engaged in destructive competition. The ICC did not revoke or modify its prior approval of any of the acquisitions. The ICC held that the proper remedy was a supplemental order with respect to the joint through service, schedule connections and the quotation of Mt. Hood's service. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 450, 462-463 (1968); *aff'd sub nom., Greyhound Lines, Inc. v. United States*, 308 F. Supp. 1033 (N.D. Ill. 1970).[4]

This action commenced on July 5, 1968. It is a monopolization case. It is based on the same acquisitions the ICC approved, and on the same conduct that had been the subject of the ICC's extensive regulatory proceedings. As the Court of Appeals put it:

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4. Greyhound sought review of the ICC order and in February 1970, the United States District Court in Chicago issued an injunction requiring restoration of the through bus, the quoting of Mt. Hood's service by Greyhound agents, publication of Mt. Hood schedules by Greyhound and related remedial measures. *Greyhound Lines, Inc. v. United States*, 308 F.Supp. 1033, 1040-1041 (N.D. Ill. 1970). In June 1971, the government filed petitions in that court charging Greyhound with civil and criminal contempt of the injunction and, six weeks after the verdict in the trial court, an order finding Greyhound in contempt was entered and fines totaling $600,000 were assessed against Greyhound. *See United States v. Greyhound Corp.*, 363 F.Supp. 525 (N.D. Ill. 1973), 370 F.Supp. 881 (N.D. Ill.), *aff'd*, 508 F.2d 529 (7th Cir. 1974).

> "*The essence of Mt. Hood's antitrust claim is that Greyhound acquired bus companies whose routes circled those of Mt. Hood* and thereafter deprived Mt. Hood of connecting or 'bridge' traffic with the purpose and effect of eliminating Mt. Hood as a substantial competitor." (App. A, p. 2)[5]

The jury returned a verdict for Mt. Hood, awarding it treble damages of $13,146,090 for the twenty-year period from 1953 to 1973. The trial judge (Judge Goodwin of the Ninth Circuit sitting by designation) then awarded Mt. Hood attorneys' fees of $1,250,000 and denied Greyhound's motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Is Inconsistent With Section 5(12) of the Interstate Commerce Act and Conflicts With Prior Decisions of This Court.

The antitrust laws represent a fundamental national economic policy, but Congress has declared that certain regulated industries are not to be governed solely by antitrust standards of competition and monopoly. Instead, they are to be regulated by a federal agency pursuant to other standards set by Congress in the applicable regulatory statute.[6] Transportation is one of those industries, and the ICC is the agency Congress has declared should regulate it pursuant to the National Transportation Policy. The decision below, contrary to Congress' intent and the prior decisions of this Court, transfers that regulation from the ICC to private plaintiffs and federal antitrust juries. It ignores completely the requirements of the National Transportation Policy.

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5. All emphasis herein is added unless otherwise stated.

6. *See, e.g.*, Interstate Commerce Act, Part I, 49 U.S.C. §§ 1, *et seq.* (railroads); Interstate Commerce Act, Part II, 49 U.S.C. §§ 301, *et seq.* (motor carriers); Federal Aviation Act, 49 U.S.C. §§ 1301, *et seq.* (commercial aviation).

The Court of Appeals' opinion admits that, "The essence of Mt. Hood's antitrust claim is that Greyhound acquired bus companies whose routes circled those of Mt. Hood and thereafter deprived Mt. Hood of connecting or 'bridge' traffic with the purpose and effect of eliminating Mt. Hood as a substantial competitor." (App. A, p. 2) But Greyhound's acquisitions of those bus companies were approved by the ICC, and approved acquisitions are expressly immunized from antitrust attack. 49 U.S.C. § 5(12). Greyhound's conduct thereafter, "made possible" by those ICC approvals (App. A, p. 18), was subject to continuing comprehensive ICC regulation to assure its conformity to the public interest, and the ICC actually regulated it. 49 U.S.C. §§ 5(10), 316; p. 7 above. Indeed, the very conduct claimed here to violate the antitrust laws was previously the subject of extensive regulatory proceedings and the ICC issued an appropriate regulatory order to remedy it. (App. A, pp. 4-7) Nevertheless, the Court of Appeals held that that same conduct may be regulated by federal courts under antitrust standards alone and without regard to whether that regulation is consistent with the public interest standard.

That holding conflicts with the principles of antitrust preemption previously established by the Court and fails to give effect even to the express antitrust exemption for approved acquisitions mandated by 49 U.S.C. § 5(12). Instead, the immunized acquisitions were "[t]he essence of Mt. Hood's antitrust claim. . . ." (App. A, p. 2) The decision below effectively destroys the express immunity of the statute. The result is that the antitrust laws have been permitted to preempt the Interstate Commerce Act and new and unneeded antitrust litigation has been created.

A. THE COURT OF APPEALS' DECISION IS CONTRARY TO ESTABLISHED PRINCIPLES OF EXCLUSIVE REGULATORY JURISDICTION.

The prior decisions of this Court establish that the antitrust laws are preempted whenever necessary to satisfy Congress'

intent or to make the regulatory scheme work. *See Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975); *United States v. National Association of Securities Dealers*, 422 U.S. 694 (Opinion of the Court) 735, 736-737 (White, J., dissenting) (1975); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963). Under Section 5 of the Interstate Commerce Act, the ICC has authority to approve acquisitions, 49 U.S.C. § 5(2), and to regulate subsequent conduct thereby made possible. 49 U.S.C. § 5(10). *See also* 49 U.S.C. § 316. There can be no doubt that Congress intended that authority to be exclusive. It said so:

> "The authority conferred by this section [Section 5] shall be exclusive and plenary . . . ." 49 U.S.C. § 5(12).

And this Court has made clear that Congress meant what it said:

> "The jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive . . . of all other state or federal authority." *Schwabacher v. United States*, 334 U.S. 182, 197 (1948); *see Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118, 125 (1948).

The decision below does not discuss this language of Section 5(12), let alone explain how the ICC's Section 5 power to regulate Greyhound's conduct can be "exclusive and plenary" if an antitrust court can regulate that same conduct by basing a $14,400,000 judgment on it.

Moreover, even apart from the failure to follow the express language of Section 5(12), the decision of the Court of Appeals is inconsistent with the prior decisions of this Court that have found preemption of the antitrust laws in the context of other regulatory schemes. *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682-691 (1975); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973);

Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963).

For example, in *Pan American*, the Court rejected an antitrust complaint charging Pan American and W. R. Grace & Co. with conspiring to monopolize air transportation on the West Coast of South America, holding that the CAB's statutory authority to regulate the "acts charged" placed the "problem . . . within the purview of the Board." 371 U.S. at 305, 312. That authority preempted the antitrust laws, because "[i]f the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." 371 U.S. at 310.

Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973), applied the *Pan American* principle to private treble damage actions. Plaintiff TWA attacked the manner in which Toolco had exercised its control of TWA obtained through a series of stock acquisitions. The acquisitions had been approved by the Civil Aeronautics Board under Section 408 of the Federal Aviation Act, 49 U.S.C. § 1378, and were immunized from antitrust attack by Section 414, 49 U.S.C. § 1384.[7] 409 U.S. at 369-376. The complaint charged that Toolco had unlawfully retained and diverted to competitors jet aircraft which were intended for TWA's use; delayed delivery of aircraft to TWA; and required TWA to lease rather than buy the aircraft. 409 U.S. at 378-379. This Court ordered TWA's complaint dismissed. The CAB's continuing jurisdiction to remedy and control Toolco's alleged abuses of power acquired in immunized acquisitions was exclusive and preempted the antitrust laws. 409 U.S. at 379-385.

Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975), held the antitrust laws inapplicable to activities of stock exchanges and their members to fix commission rates. The Court concluded that the Securities and Exchange Commission's authority

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7. Those Sections are, of course, the counterparts to Sections 5(2) and 5(12) of the Interstate Commerce Act.

to require the exchanges to fix "reasonable rates of commission" as determined by the standards of the Securities Exchange Act of 1934 precluded antitrust regulation of the anticompetitive price-fixing activities. 422 U.S. at 689-691.[8]

In *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975), the United States charged that the NASD had construed and implemented its rules to impose unlawful restrictions on the secondary market for mutual fund securities. The SEC had the authority to disapprove the NASD rules, 422 U.S. at 732, and that authority was held to include the power to regulate and control "the manner in which . . . [the NASD] construes and implements them." 422 U.S. at 733. This SEC "oversight" was deemed "sufficiently pervasive to confer implied immunity," 422 U.S. at 730-735, because application of the antitrust laws "poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards." 422 U.S. at 735.

The principles of these decisions apply with equal force here. The ICC's power to regulate the conduct involved cannot be doubted; in fact it exercised that power. That its power is exclusive is also clear. First, the statute conferring it says so. Second, the ICC's power is as, if not more, pervasive than that of the CAB in *Hughes Tool* and *Pan American* or of the SEC in *Gordon* and *NASD*, and the conduct involved—competition among regulated carriers—is even more central to the regulatory scheme.[9] Third,

8. The SEC has no express authority to immunize such fixed rates from antitrust attack. There is no counterpart to Section 414 of the FAA or Section 5(12) of the ICA in the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, *et seq.* Quite the contrary, the statute expressly preserves all other laws. 15 U.S.C. § 73bb.

9. *See* S. Rep. No. 482, 74th Cong., 1st Sess. 2 (1935); C. Fulda, *Competition in the Regulated Industries, Transportation* § 2.5 (1961). This fact makes antitrust preemption more appropriate here than in *Hughes Tool*. The conduct involved there was not competitive practices among carriers but anticompetitive conduct in the aircraft supply market, a matter of tangential concern to the CAB. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 397-402 (1973) (Burger, C.J., dissenting).

the "danger" that Greyhound will be subjected to "duplicative and inconsistent standards" is equally substantial because the "sole aim of antitrust legislation is to protect competition,"[10] whereas the much broader standards of the National Transportation Policy govern the ICC, and it can approve conduct that is inconsistent with the antitrust laws. 49 U.S.C. preceding § 1; *Minneapolis & St. L. Ry. v. United States*, 361 U.S. 173, 187 (1959); *see* pp. 17-19 below. Therefore, by authorizing the ICC to adjudicate the legality of Greyhound's conduct "in accordance with a competitive standard inconsistent with the controlling criteria of the antitrust laws," Congress intended to "replace normal antitrust enforcement with the administrative regime." *United States v. National Association of Securities Dealers*, 422 U.S. 694, 740-741 (1975) (White, J., dissenting).

Contrary to both Congress' expressed intention and this Court's prior decisions, the Court of Appeals denied preemption because the ICC "did not approve such conduct when it approved the acquisitions" and "subsequently disapproved that conduct." (App. A, p. 11)[11] Thus the decision below makes preemption of the antitrust laws turn on whether the regulatory agency has *approved* the conduct attacked by the antitrust complaint, and not on whether the agency has the authority to regulate and remedy that conduct.

10. *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 689 (1975).

11. The Court of Appeals suggests that the ICC "did not contemplate Greyhound's challenged conduct as likely to occur." (App. A, p. 11) That is not so. The ICC approved the first two acquisitions over Mt. Hood's protest based upon the same charges Mt. Hood made here, saying:

> "Even if some restraint of competition should result, we may approve the transactions if they are otherwise consistent with the public interest." *The Greyhound Corp.*, 50 M.C.C. 123, 140 (1947) (R. 1845) (pp. 5-6, above).

The Court of Appeals relied on *Hughes Tool* for that proposition.[12] In fact that proposition is in flat conflict with the facts and holding of *Hughes Tool.* In *Hughes Tool* the CAB had not approved the type of conduct which underlay the antitrust complaint. The CAB had approved a control relationship, but not the manner in which that control would be or was exercised. Specifically, it did not approve or authorize the conduct of which TWA complained—the diversion, retention, delay in delivery or lease rather than sale of aircraft. That is demonstrated by the CAB orders, which contain no such approval, *Trans World Air., Control By Hughes,* 32 C.A.B. 1363 (1960); *Trans World Airlines, Inc., Further Control by Hughes Tool Co.,* 12 C.A.B. 192 (1950); *Transcontinental & Western Air, Inc., Further Control by Hughes Tool Co.,* 9 C.A.B. 381 (1948); *Transcontinental & Western Air, Inc., Control by Hughes Tool Co.,* 6 C.A.B. 153 (1944); by the CAB amicus brief to this Court, which disclaimed any such approval (R. 1434, 1435); and by the opinions of each of the lower courts which passed on TWA's antitrust complaint. *Trans World Airlines, Inc. v. Hughes,* 214 F.Supp. 106, 109-110 (S.D.

12. The Court of Appeals focused solely on *Hughes Tool. Gordon* and *NASD* were both decided after the appeal was briefed and argued. It said *Hughes Tool* did not apply to this case because:

> "The crux of the distinction between the two cases is that, as the Supreme Court viewed the record in *Hughes Tool,* the regulatory agency involved had considered the type of conduct which underlay the antitrust complaint and had approved it as in the public interest . . . ." (App. A, p. 11) (footnote omitted)

The Court of Appeals relied for this distinction on *In re REA Express, Inc.,* 412 F.Supp. 1239, 1258-1262 (E.D. Pa. 1976); *Air Freight Haulage Co., Inc. v. Ryd-Air, Inc.,* 408 F.Supp. 446 (S.D.N.Y. 1976) (App. A, p. 11, n.15); and *Scroggins v. Air Cargo, Inc.,* 534 F.2d 1124 (5th Cir. 1976) (App. A, p. 11, n.16). But both *REA Express* and *Scroggins* held that the antitrust laws *were* preempted, and *Air Freight Haulage* held only that the parties involved were not "air carriers" and thus were not subject to CAB jurisdiction.

N.Y. 1973); *Trans World Airlines, Inc. v. Hughes,* 332 F.2d 602, 610 (2d Cir. 1964); 449 F.2d 51, 56 (2d Cir. 1971).[13]

This Court reversed and ordered the complaint dismissed, not because the CAB had approved Toolco's anticompetitive conduct, but because the lower courts were wrong in holding that such approval was necessary for preemption:

> "It is said, however, that while the Board modified its original 'control' order under § 408 so as to permit sale or lease of the aircraft out of which the alleged antitrust violations occurred, *the approval of the Board did not sanction the precise way in which Toolco allegedly used the power to the disadvantage of TWA. But that is not an answer to the problem of exemption.*" 409 U.S. at 379.

The answer to the problem is that

> "[T]he *authority* of the Board to grant the power to 'control' and to investigate and alter the manner in which that 'control' is exercised leads us to conclude that this phase of CAB jurisdiction, like the one in the *Pan American* case, preempts the antitrust field." 409 U.S. at 385.[14]

Decisions of this Court both before and after *Hughes Tool* also make clear that antitrust preemption does not turn on an agency's approval of anticompetitive conduct; instead, it turns on the agency's authority to regulate the conduct. In *Pan American World Airways, Inc. v. United States,* 371 U.S. 296 (1963), the CAB had not approved the alleged anticompetitive practices; indeed it had

13. Indeed, in *Hughes Tool* the Second Circuit specifically rejected preemption for the same reason that the Ninth Circuit did so here. It said "the CAB orders did not constitute blanket approval of the claims in the complaint and hence were not a defense to TWA's action." *Trans World Airlines, Inc. v. Hughes,* 449 F.2d 51, 56 (2d Cir. 1971); *compare,* App. A, p. 11. This Court, of course, reversed and held that reasoning unsound. 409 U.S. at 379.

14. If the CAB had approved the conduct involved, the lengthy majority and dissenting opinions of this Court would have been unnecessary, because approved conduct is automatically immunized. 49 U.S.C. § 1384.

in large part *disapproved* them, and, as in this case, had required corrective measures. See 371 U.S. at 300, n.5; *Additional Service to Latin America,* 6 C.A.B. 857, 914 (1946). This Court's conclusion that the antitrust laws were preempted was based upon the agency's power to regulate the conduct complained of, not its approval of them, because:

> "If the courts were to intrude independently with their construction of the antitrust laws, two regimes *might* collide." 371 U.S. at 310.

In *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659 (1975), the Court noted that the SEC had acted to require competitive commission rates. *See* 422 U.S. at 675-676. Nevertheless, the disapproved fixed commission rates retained immunity from the antitrust laws.

Whether an agency's regulatory jurisdiction is exclusive depends on Congress' intent and not on the fortuities of whether the conduct was the subject of an actual agency proceeding and, if so, what action the agency took with respect to it. If Congress intended the regulatory jurisdiction to be exclusive, the agency "need not actually have approved the conduct at issue or even have been aware of it, so long as the agency had the power to exercise control over the general class of conduct if it chose to do so." Note, *AT&T and the Antitrust Laws: A Strict Test for Implied Immunity,* 85 Yale L.J. 254, 261 (1975). The decision of the Court of Appeals in this case follows precisely the opposite principle and thus fails to follow what *Hughes Tool, Pan American* and *Gordon* teach.

The root of the Court of Appeals' error seems to be in its reasoning that because the ICC disapproved Greyhound's conduct, it is not "necessary to exempt Greyhound's conduct from antitrust restraints 'to make the [Interstate Commerce Act] work.'" (App. A, p. 9) But that misunderstands the nature

of the problem.[15] The problem is not simply that an agency might find conduct lawful which an antitrust court finds unlawful, although that might happen. The problem is the conflict between competing jurisdictions, which, resting on different statutes, will apply different standards and different remedies to the same conduct.[16]

Applying antitrust standards and remedies to "disapproved" conduct interferes with the regulatory scheme just as much as does applying them to approved conduct. It is one thing for the ICC

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15. This Court has explicitly rejected the idea that exemption turns on whether the particular conduct attacked is necessary to make the regulatory scheme work. *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659, 687 (1975) (disapproving a portion of the decision in *Thill Securities Corp. v. New York Stock Exchange, Inc.,* 433 F.2d 264 (7th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971)); *cf., San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 246-247 (1959). Like the United States in *Gordon,* the Court below has confused two questions:

> "We believe that the United States, as *amicus,* has confused two questions. On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity." 422 U.S. at 688. *See* S. Robinson, *Recent Antitrust Developments: 1975,* 76 Colum. L. Rev. 191, 222-224 (1976).

16. In this case, for example, Mt. Hood claimed that if Greyhound complied with the law Mt. Hood would carry 95 per cent of all relevant bus traffic. In awarding Mt. Hood damages on that basis, the jury effectively imposed on Greyhound the *requirement* to promote Mt. Hood's service sufficiently to ensure that at least 95 per cent of the relevant traffic uses it. Backed up by treble damage sanctions that is an imposing standard. But Greyhound's promotion of Mt. Hood's service was also the subject of intense and lengthy regulatory proceedings, and nowhere did the ICC impose or make reference to such a standard. In short, this is a case in which Greyhound has been subjected to different requirements, and the antitrust court both punished and required what the ICC did not.

to tell Greyhound to change its practices to conform to the public interest; it is a very different thing for a federal court to assess $14,400,000 against Greyhound for those practices with no consideration by the ICC or anyone else of whether that staggering penalty serves the National Transportation Policy. Would that policy be served if judgments such as that drove carriers into insolvency and thereby deprived the traveling public of needed bus service? If "disapproval" by the ICC were to open the antitrust floodgates, then the ICC clearly could not perform its duties pursuant to the standards Congress prescribed in the regulatory statute. It could not regulate conduct by applying Interstate Commerce Act standards and remedy conduct inconsistent with those standards without also considering whether subjecting the carrier to additional attack under the antitrust laws would further the National Transportaion Policy. The undesirable consequences of antitrust litigation entailed by "disapproval" might well compel the ICC to approve conduct inconsistent with the public interest.[17] In those circumstances both antitrust and public interest policies are frustrated.

Similarly, in determining whether to make acquisitions and in operating the properties acquired, carriers would be required to judge their conduct not only by the public interest standards of the Interstate Commerce Act, but also by the standards of the antitrust laws, which might or might not apply. The resulting confusion and potential for massive liability would surely discourage carriers from making acquisitions that would serve the public interest. That is just the opposite of what Congress

17. When the antitrust jury is told that the ICC had disapproved the conduct, as this one repeatedly was (*e.g.*, Exs. 426, pp. 3-4, 464, 467, 468; Tr. 1298-1299, 1302-1310, 2515-2518, 6741-6743), an adverse verdict is almost inevitable. *Cf. Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 412 (1976) (arbitrator would be "heavily influenced or wholly pre-empted" by preliminary judicial determination).

intended when it passed the Interstate Commerce Act. *County of Marin v. United States*, 356 U.S. 412 (1958).

The opinion below fails adequately to consider any of this, and the decision reached has a profound impact on the working of the Interstate Commerce Act and the administration of the antitrust laws in the context of a regulated industry. This Court should review the important questions presented.

B. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE EXPRESS IMMUNITY PROVISION OF 49 U.S.C. § 5(12).

Quite apart from the issue of antitrust preemption by virtue of the ICC's continuing jurisdiction, the decision below raises important questions concerning the effect of the express immunity mandated by 49 U.S.C. § 5(12). That section provides that for each acquisition approved by the ICC Greyhound was

> ". . . relieved from the operation of the antitrust laws . . . insofar as may be necessary to enable [it] to carry into effect the transaction so approved . . . and to hold, maintain, and operate any properties and exercise any control of franchises acquired through such transaction." 49 U.S.C. § 5(12).

The purpose of Section 5 of the Interstate Commerce Act is "to facilitate merger and consolidation" to fulfill Congress' desire "that the industry proceed toward an integrated national transportation system." *County of Marin v. United States*, 356 U.S. 412, 416, and authorities cited at n.7, 417-418 (1958); *see, e.g.*, H.R. Rep. No. 2016, 76th Cong., 3d Sess. 61 (1940). Congress expected that the need for a national transportation system would require the ICC to approve acquisitions which "might otherwise violate the antitrust laws." *Minneapolis & St. L. Ry. v. United States*, 361 U.S. 173, 187 (1959). Therefore, it is essential that approved acquisitions be immunized from antitrust attack, regardless of any anticompetitive purpose or effect. *See United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 560 (1939); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203, 206 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974). Grey-

hound's acquisitions in the Pacific Northwest were not insidious isolated efforts to "get" Mt. Hood. They were simply part of a nationwide program of integration undertaken in accordance with Congress' mandate, and Section 5(12) immunizes them. *See generally* C. Fulda, *Competition in the Regulated Industries, Transportation,* § 5.36 (1961).

Nevertheless, this case was tried (and reviewed) as if Section 5(12) never existed. It was tried as an unfettered monopolization case—an attack on the market position that Greyhound secured by the acquisitions, their alleged anticompetitive purpose and effect and the anticompetitive conduct they made possible. (*See* App. A, pp. 2 and 18; *see also, e.g.,* Ex. 126; Tr. 340-343A, 439-440, 3469-3471, 3475-3515, 6277-6280; and Appendix B to Greyhound's opening brief to the Ninth Circuit.) No limitation was placed on the use of evidence of immunized transactions, and the court refused to instruct the jury that the acquisitions and Greyhound's conduct necessary "to hold, maintain and operate" the acquired companies were immune from antitrust attack. To the contrary, the jury was expressly instructed that Greyhound's actions to "maintain" monopoly power (acquired through immunized transactions) was a violation of the Sherman Act even if they "were wholly innocent or legal acts." (Tr. 6752-6753, 6759) How can that be squared with Section 5(12)?[18]

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18. The Court of Appeals says that "the jury could not base a finding of monopolization on the approved acquisitions themselves; improper use of the acquired power was required." (App. A, p. 16) But that is only half right. The jury was told the second, but it was not told the first. (Tr. 6752-6753) It was not told that Greyhound's acquisitions were lawful and immune from antitrust attack. And while the jury was given the general instruction that an "improper use" of power is required (Tr. 6753), it was specifically instructed that such an "improper use" could be based on "wholly innocent and legal acts" to maintain the immunized market position:

> "In showing this element of a deliberate purpose, the plaintiff is not required to prove that defendants engaged in any unlawful or predatory or unfair acts or practices. *Acts done to maintain, foster or increase a monopoly may be wholly innocent or legal acts, yet constitute evidence of a purpose to monopolize.*" (Tr. 6759)

The Court of Appeals' answer is that Section 5(12) does not apply to this case because the ICC determined that Greyhound's conduct was not "necessary." (App. A, p. 7) Thus, the decision below stands for the proposition that if *some* of a carrier's conduct is "unnecessary," then *none* of it is immune. But that is a *non sequitur*. The fact that some of Greyhound's conduct was found to be "unnecessary" does not mean that all of it was, and there is nothing in the statute to suggest that Congress intended such an illogical result.[19] Indeed, after consideration of all of Mt. Hood's charges, the ICC did not withdraw its orders approving the acquisitions; those acquisitions, including their purpose and effect, are still expressly immunized. Yet this solid core of immunity was disregarded, and the jury was permitted to decide the case in ignorance of it.[20]

What function is left to the ICC and what becomes of the National Transportation Policy if acquisitions approved and immunized in the public interest can be the cornerstone of an antitrust attack?

This Court should grant certiorari to review the application of the immunity provisions of 49 U.S.C. § 5(12) to a private action for treble damages, because the decision below effectively eliminates that section and Congress' purpose in enacting it.

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19. The Court of Appeals' premise is not supported by the record either, for the ICC made no decision about what conduct was or was not necessary in the context of the antitrust exemption. The ICC did not even address the question of Section 5(12).

20. The Court of Appeals approved the refusal to instruct on 49 U.S.C. § 5(12) on the ground that antitrust immunity is a "legal question, not an issue of fact for the jury." (App. A, p. 13) That might make sense if the trial court had determined the scope of immunity and excluded evidence of immunized conduct. But it did not. It admitted all that evidence and tossed the whole case up for the jury to decide, without instructing it that the acquisitions were immune from antitrust attack. (p. 20, above)

II. The Court of Appeals' Decision Is Contrary to Section 5(a) of the Clayton Act and Presents Important Questions of Antitrust Law and Enforcement.

Over Greyhound's objections the trial judge admitted in evidence consent decrees into which Greyhound had entered in 1947 and 1957.[21] The court also permitted extensive testimony and argument concerning the decrees.[22] Finally, the court instructed the jury in detail about specific acts prohibited by the decrees (Tr. 6742-6747) and then told the jury to use the decrees in determining,

> "the issues of motive, intent and purpose of Greyhound and the reasonableness of their behavior under Section 1 and 2 of the Sherman Act . . . ." (Tr. 6747)

The decision of the Court of Appeals upholds what the trial court did without discussing the serious questions presented or the consequences of its action.

Absent Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), no judgment or decree in a prior government case would be admissible. *See Buckeye Powder Co. v. Du Pont Powder Co.*, 248 U.S. 55, 63 (1918) (Holmes, J.); *Buckhead Theatre Co. v. Atlanta Enterprises, Inc.*, 327 F.2d 365 (5th Cir.), *cert. denied*, 379 U.S. 888 (1964); *International Shoe Mach. Corp. v. United Shoe Mach. Corp.*, 315 F.2d 449, 459 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963); Timberlake, *The Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws*, 36 N.Y.U.L. Rev. 991, 994 (1961).

Nor does Section 5(a) support the evidentiary use of the consent decrees in this case. Section 5(a) provides:

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21. Both decrees were entered before any testimony was taken, and each of them states that it was entered without admission by any party of any issue. (Ex. 62, p. 2; Ex. 265, p. 1)

22. See, Exs. 62, 265, 268; Tr. 257-259, 263-267, 370-371, 906, 908-916, 1263-1264, 1401-1413, 1430-1431, 1477, 1792-1794, 2062-2065, 2071, 2243, 2246, 3463-3469, 3477, 3484, 3488, 3591-3599, 3651-3659, 3724-3727, 3772-3774, 5535-5537; Closing Argument Tr. 6660-6661.

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws *to the effect that a defendant has violated said laws* shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, *as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto:* Provided, *That this section shall not apply to consent judgments or decrees entered before any testimony has been taken* or to judgments or decrees entered in actions under section 15a of this title." 15 U.S.C. § 16(a).

By its terms, then, Section 5(a) applies only to a judgment or decree "to the effect that a defendant has violated [the antitrust] laws." It is plainly not applicable to these decrees, which expressly disclaim any admission that Greyhound violated the antitrust laws. (Ex. 62, p. 2; Ex. 265, p. 1) Section 5(a) also applies only as to "matters respecting which" the judgment "would be an estoppel" between the defendant and the government. *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951); *see Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 316-317 (1965). It is plainly not applicable to these decrees, which were settlements deciding nothing and which therefore would have no collateral estoppel effect even between Greyhound and the government. *United States v. International Building Co.*, 345 U.S. 502 (1953); Restatement of Judgments § 68, Comments h, i (1942); Restatement (Second) of Judgments § 68, Comment e (Tent. Draft No. 4, 1977).

Moreover, the consent decrees were entered "before any testimony [had] been taken," and thus the use of them as evidence on the ultimate issues under the Sherman Act is in square conflict with the proviso of Section 5(a). Congress reconfirmed that

that proviso means what it says when it reformed consent decree procedures as part of the Antitrust Procedures and Penalties Act in 1974. The Senate Report on the bill stated:

> "Section 2(h) provides that neither the public impact statements nor any proceedings utilized by the court to make its public interest determination shall be admissible in an action for damages, either by the government or a private party. *It is the intent of the Committee to retain the provision presently in Section 5 of the Clayton Act which prevents the use of a consent decree in any way in subsequent litigation as prima facie evidence of a violation.* As previously stated, the Committee wishes to retain the consent judgment as a substantial antitrust enforcement tool." S. Rep. No. 93-298, 93d Cong., 1st Sess. 7 (1973). *See also* H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. 6 (1974).

Even if not flatly prohibited by the words of Section 5(a), the decision below conflicts with its purpose to encourage settlement of government antitrust cases by consent decrees. *See City of Burbank v. General Electric Co.*, 329 F.2d 825, 835 (9th Cir. 1964). The Senate Report on antitrust and penalties also re-emphasized that purpose. (See quotation, above.) The Justice Department's consent decree program is of "crucial" importance to the effective enforcement of the antitrust laws.[23] The decision below, if this

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23. "Approximately 80 percent of all complaints filed by the Antitrust Division of the Department of Justice are settled prior to trial by the entry of a consent decree . . . . Obviously, the consent decree is of crucial importance as an enforcement tool, since it permits the allocation of resources elsewhere." S. Rep. No. 93-298, 93d Cong., 1st Sess. 5 (1973).

See also Hearings on H.R. 9203, H.R. 9947 and S. 782 (Consent Decree Bills) Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 93d Cong., 1st Sess., ser. 20, at 61-63, 84-85, 87 (1973); ABA, Antitrust Law Developments 237 (1975) and First Pocket Part Supp. at 54; Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions*, 85 Yale L.J. 541, 561 (1976); *Symposium: Relationships Between Government Enforcement Actions and Private Damage Actions*, 37 Antitrust L.J. 823, 842-843 (1968); J. Flynn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals*, 53 Iowa L.Rev. 983, 1003 (1968).

Court permits it to stand, will seriously undermine, if not kill, that program. As the decision deprives Greyhound of the benefit of its bargain with the government in entering into the decrees, it requires any defendant considering a consent decree settlement to discount entirely the supposed benefits of Section 5(a). In other words it eliminates the incentive for defendants to settle government cases.

Finally, the Ninth Circuit's decision is inconsistent with the weight of prior decisions, including one of its own, which have held that consent decrees within the proviso of Section 5(a) are inadmissible in antitrust litigation.

> "[A] consent judgment whether it be in a civil case or a nolo plea in a criminal case, or any evidence thereof, is not admissible in a treble damage action and can have no real purpose except to attempt to prejudice a defendant before a jury." *Control Data Corp. v. IBM*, 306 F.Supp. 839, 844 (D. Minn. 1969), *aff'd per curiam sub nom., Data Proc. Fin. & Gen. Corp. v. IBM*, 430 F.2d 1277 (8th Cir. 1970); *City of Burbank v. General Electric Co.*, 329 F.2d 825, 834 (9th Cir. 1964); *Baush Mach. Tool Co. v. Aluminum Co. of America*, 79 F.2d 217, 226 (2d Cir. 1935); *Kunc v. ARA Services, Inc.*, 414 F.Supp. 809 (W.D. Okla. 1976).

The Court of Appeals' unprecedented decision was reached without considering Section 5(a), Congress' purpose in enacting it, or the cases which have construed it.[24] It raises serious ques-

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24. The Court of Appeals says only that the "admissibility of a consent decree is a matter committed to the court's discretion" and that "there was no abuse of discretion here." (App. A, p. 19) For authority it cites two cases. In *Control Data Corp. v. IBM Corp.*, 421 F.2d 323 (8th Cir. 1970), two judges of the Eighth Circuit declined to allow plaintiffs to file an interlocutory appeal from a pretrial order striking from the complaints all allegations relating to IBM's consent decrees and barring any evidentiary use of reference to the decrees at the trial. *Vitagraph, Inc. v. Perelman*, 95 F.2d 142 (3d Cir.), *cert. denied*, 305 U.S. 610 (1938), upheld the admission of a consent decree *in a non-jury case* without any discussion of the matter and only as evidence of a fact apparently admitted in the decree. (95 F.2d at 146)

tions concerning the effect to be given to consent decrees "before any testimony has been taken" under Section 5(a) of the Clayton Act and jeopardizes the major part of the government's antitrust enforcement program. This Court has never before considered these questions. It ought to do so now.

III. The Court of Appeals' Decision Presents Important Questions of the Application and Tolling of the Statute of Limitations in Antitrust Cases.

The complaint in this action was filed on July 5, 1968. The statute of limitations therefore should bar all claims prior to July 5, 1964. 15 U.S.C. § 15b. The Court below, however, upheld a damage award for claims spanning twenty years, from 1953 to 1973. That five-fold expansion of the statutory damage period was based upon a combination of rulings producing a bizarre result reminiscent of a Rube Goldberg contraption.

First, adopting an unprecedented theory, the Court of Appeals permitted tolling for alleged fraudulent concealment from 1953 to December 14, 1960. Then it saved those twenty-year old claims from being barred on December 14, 1964, by holding that the statute was tolled once again, this time under the Clayton Act, 15 U.S.C. § 16(i), by the government's request on precisely that date for leave to intervene in an ICC proceeding instituted by Mt. Hood. Thus, the Court of Appeals extended and enlarged and combined these exceptions to the four-year statute of limitations until they swallowed it up. The decision presents important questions concerning the application of the statute of limitations prescribed by the Clayton Act which this Court has never considered.

A. THE DECISION BELOW IS CONTRARY TO 15 U.S.C. § 16(i).

Tolling under Section 16(i) was essential to the award of all damages beyond the normal four-year period—some $5,194,617 after trebling. Section 16(i) provides:

> "Whenever any civil or criminal proceeding is *instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws,* but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action arising under said laws and *based in whole or in part on any matter complained of in said proceeding* shall be suspended during the pendency thereof and for one year thereafter. . . ." 15 U.S.C. § 16(i).

Not one of the statute's explicit requirements is satisfied here. The relevant facts are as follows:

On or about October 7, 1964, Mt. Hood filed with the ICC a "petition . . . for an order reopening [certain Greyhound acquisition cases] and attaching certain terms, conditions and limitations to the exercise of the privileges therein granted." (R. 1410) On December 14, 1964, the United States petitioned for leave to intervene. The petition did not allege that Greyhound was violating the antitrust laws (or any other law), and it sought no relief or remedy against Greyhound. (R. 2266, *et seq.*) It took no position on the merits of the dispute between Mt. Hood and Greyhound, and expressly disclaimed any knowledge of the matters complained of by Mt. Hood:

> "We have no way of knowing whether those of Mount Hood's allegations which Greyhound denies are true or false; resolution of such controversies is a typical function of a hearing." (R. 2268)

The United States was not permitted to intervene until May 27, 1965. It raised no new issues. Indeed, the ICC specifically limited its participation to the Interstate Commerce Act issues Mt. Hood had raised. (R. 2276)

The Court of Appeals held that these facts activated Section 16(i) and tolled the statute of limitations commencing December 14, 1964, the date on which the petition for leave to intervene

was first filed, and four years to the day after the date on which Mt. Hood was later (coincidently) found by the jury to have "discovered" its cause of action. That holding is erroneous and contrary to Section 16(i) in every respect.

First, the holding applies Section 16(i) to a proceeding instituted by Mt. Hood, not the United States. A party who intervenes in a proceeding previously brought by someone else has not "instituted" that proceeding.

Second, since the petition for leave to intervene did not charge Greyhound with any wrongdoing, took no position on the merits and sought no relief, this case is not based on any matter "complained of" by the government in the ICC proceeding.[25] *See Leh v. General Petroleum Corp.*, 382 U.S. 54, 65 (1965) ("In general, consideration of the applicability of [16(i)] must be limited to a comparison of the two complaints on their face.").

Third, the Court of Appeals applied Section 16(i) to a proceeding brought under Section 5(10) of the Interstate Commerce Act, and which concerned only the enforcement of that Act. (R. 2266, 2276) In no way could Mt. Hood's institution of that proceeding be considered an action to "prevent, restrain, or punish violations of the antitrust laws,"[26] and intervention by the United States did not change that. The United States sought no relief at all. Even if the government had attempted and been permitted to assert antitrust violations and sought some relief in respect to them, the ICC is without power directly to enforce the antitrust laws. *McLean Trucking Co. v. United States*, 321 U.S. 67, 79 (1944).

25. The government's primary purpose in seeking to intervene was to urge the ICC not to dispose of the case by summary action, but to hold a full hearing for the benefit of *both* parties. (R. 2267-2269)

26. The "antitrust laws" as used in Section 16(i) are specifically limited to the Sherman Act, Clayton Act and the Wilson Tariff Act. 15 U.S.C. § 12. That list is exclusive. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 375-376 (1958).

Finally, the Court of Appeals erred in holding that Section 16(i) comes into operation on the date on which the United States first seeks leave to intervene. Until the ICC granted its petition, the government was not in the case. It had no right to participate or take any action in the proceedings. *See* ICC Rule 72(e), 49 C.F.R. § 1100.72(e) (1976).[27] The petition to intervene was not granted until May 27, 1965, and that is the earliest date on which it could be said that the government "instituted" that proceeding, assuming that such a petition could ever be said to have "instituted" it.[28]

In sum, the ICC case involved neither a civil or criminal proceeding "instituted by the United States," nor any proceeding "to prevent, restrain or punish violations of any of the antitrust laws." And this case is not based on "any matter complained of in said proceeding," because the government did not complain of anything in that case. The petition of the United States for leave to intervene in a proceeding previously instituted by plaintiff to determine possible violations of the Interstate Commerce Act, which makes no charges, seeks no relief and is restricted to the issues framed by plaintiff, is not within either the letter or the spirit of Section 16(i).

The Court of Appeals chose not to follow the "literal wording of Section 16(i)." (App. A, p. 23) Instead it relied on the per-

27. The government's petition might have been denied. Had it been, the statute clearly would not have been tolled. No one contends that the mere filing of a petition for leave to intervene tolled the statute of limitations. The order granting intervention could not retroactively toll the statute, because by then it had already run and there was nothing to toll.

28. That conclusion has two effects on the judgment here. First, since the jury found that plaintiff knew or should have known of its claims on December 14, 1960, those claims were time barred after December 14, 1964, and Section 16(i) cannot rescue them because the petition to intervene was not granted until May 27, 1965. Second, any tolling under the Section would extend the claim period back only to May 27, 1961. Since there is no evidence of the amount of damage suffered in the period May 27, 1961, to July 5, 1964, the verdict and judgment to that extent reflect an incorrect damage period.

ceived purpose of the statute: to permit "private litigants to have the benefits that may flow from governmental antitrust enforcement efforts" (App. A, p. 23), because it believed that the petition for leave to intervene was the "functional equivalent of a direct action. . . ." (*Id.*, p. 24) But that purpose hardly justifies rewriting the statute as the Court of Appeals has done. And the reasoning on which the Court of Appeals relies does not even fit this case. The government made no antitrust enforcement efforts here; its petition to intervene was not the equivalent, "functional" or otherwise, of an antitrust complaint, and the only benefit Mt. Hood derived from the government's intervention in the ICC proceeding is the tolling of the statute itself.[29] Moreover, the Court of Appeals' novel "functional equivalent" test would require a detailed review of the record in each case to see whether the position ultimately taken by the government was or was not the "functional equivalent" of direct action. That creates more problems than it solves. *Cf. Leh v. General Petroleum Corp.*, 382 U.S. 54, 65 (1965). The possibilities of government participation and the circumstances under which it might occur are limitless.[30] The government may be with one party on one issue, with the other on a second and with neither on a third. The uncertainty created by the decision below by itself provides a compelling reason to grant certiorari.

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29. The Court of Appeals says that the ICC "proceedings were of a kind likely to produce benefits to . . . plaintiff in a subsequent antitrust suit," and that "governmental investigative and legal resources were made available to fully develop the facts and the law favorable to the common position of the government and Mt. Hood on these issues." (App. A, pp. 23-24) Nothing is cited to justify those statements. The government's petition did not endorse Mt. Hood's charges or assert any position in "common" with Mt. Hood. (p. 27, above)

30. In some administrative proceedings, government participation may even occur without notice to the subsequent private treble damage defendant, leaving him in a position where he had no reason to preserve records and other information necessary for his defense during the period of the administrative proceedings.

Finally, the ramifications of the Court of Appeals' extension of Section 16(i) are truly alarming. The number and variety of regulatory proceedings in which the Justice Department participates to express its views are legion.[31] No one previously has even suggested that the statute of limitations was tolled by reason of such participation. Unless this Court acts, the Court of Appeals' decision will revive countless stale antitrust claims previously believed by everyone to be long since gone.

This Court has never addressed the questions raised here concerning the scope of Section 16(i). The nearest it has come was twelve years ago in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), where the Court held the statute was tolled by a Federal Trade Commission action to enforce Section 7 of the Clayton Act.[32] Even that application of the tolling provision, supported by only five members of the Court, was recognized to be tenuous.[33] The Court of Appeals' application of Section 16(i) in this case goes much further. It is plainly impossible to justify, and clearly presents a question of importance in the administration of the Clay-

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31. The Assistant Attorney General in charge of the Antitrust Division is charged with responsibility to intervene and assert antitrust considerations in proceedings before "such agencies as the Civil Aeronautics Board, Interstate Commerce Commission, Federal Communications Commission, Federal Maritime Commission, Federal Power Commission, Federal Reserve Board, Federal Trade Commission, Nuclear Regulatory Commission, and Securities and Exchange Commission, . . ." 28 C.F.R. Ch. 1, Part O, Subpart H, § 0.40(b) (1976).

Any CCH Trade Regulation Report reveals that the Antitrust Division takes its responsibilities seriously. Excerpts from just one such report are contained in Appendix F to this petition.

32. Section 7 of the Clayton Act, unlike Section 5 of the Interstate Commerce Act, is one of the "antitrust laws."

33. The Solicitor General, arguing for the application as *amicus curiae*, admitted that the " 'result is difficult and perhaps impossible to justify in terms of conventional analysis of the text and legislative history . . .' " 381 U.S. at 324 (Black, J., dissenting).

ton Act. *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 314 (1965). The Court should grant certiorari.

B. THE COURT OF APPEALS' DECISION RAISES SERIOUS QUESTIONS CONCERNING THE APPLICATION OF THE DOCTRINE OF FRAUDULENT CONCEALMENT TO PRIVATE ANTITRUST LITIGATION.

This Court has never considered whether the doctrine of fraudulent concealment can be used to alter the basic four-year statute of limitations in private antitrust litigation, or, if it can, what legal principles should govern its use. This case provides an appropriate opportunity for the Court to do so.

The Court of Appeals said that *prior* to December 14, 1960:

> 1. Mt. Hood complained about Greyhound's quoting and routing practices; (App. A, p. 21)
>
> 2. Mt. Hood suspected Greyhound of unlawful conduct; (App. A, p. 21)
>
> 3. Mt. Hood had knowledge of Greyhound's violations of consent decrees that prohibited practices the same as those charged in this case; (*See* App. A, pp. 19, 21-22) and
>
> 4. Mt. Hood was aware of the growth of Greyhound's power and of the commission of predatory acts by some of its agents. (App. A, p. 22)[34]

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34. Even that description of the record of Mt. Hood's knowledge of its claims does not do it justice. The record showed that Mt. Hood complained repeatedly, often under oath, from 1943 on of the very practices that were alleged in this case to violate the antitrust laws. It also showed repeated charges by Mt. Hood, some again under oath, that Greyhound's practices were inconsistent with the assurances it had given to Mt. Hood and the ICC. (Tr. 3599, 3814-3817, 3832, 3834, 3836, 3858-3859; Ex. 45, pp. 227, 231, 236; Exs. 197, 215, 297, L-3, E-11-A, G-11-A, D-12) Indeed, the record was so compelling that the trial court said it would be *"irresponsible"* to submit the fraudulent concealment question to the jury or to allow any verdict based on it to stand. (Tr. 4888-4889, 5969, 6701) But it did just that, with no explanation at all. (App. C)

Nevertheless, the Court of Appeals affirmed the jury's finding of fraudulent concealment[35] because, in response to Mt. Hood's complaints, Greyhound denied that the incidents occurred or represented that they were isolated and not countenanced by management. (App. A, pp. 21-22) Thus, the decision rests upon a novel and unsound rule of law: One who suspects wrongdoing and even has charged another with it under oath may be excused from his duty to file his action if the other denies the charges. Under the decision below, denial of alleged wrongdoing constitutes fraudulent concealment that tolls the statute.[36]

But, as a matter of common sense, Greyhound's denials and representations could not take away the knowledge (or at least notice) that Mt. Hood had when it made its complaints in the first place. And the previously decided cases, including Ninth Circuit cases, hold as a matter of law that such denials and representations do not extend the limitations period:

> "Restatements of the fraudulent representation do not of themselves constitute concealment, and where a party is once put upon notice of fraud he cannot avoid the consequences

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35. The jury found in answers to special interrogatories that there was fraudulent concealment from 1953 to 1964, but also that Mt. Hood knew or should have known of the antitrust violation on December 14, 1960. This latter finding was thus inconsistent both with the other special verdict and with the general award of damages for the 1953-1964 period. Contrary to Rule 49(b), Fed.R.Civ.P., the trial court did nothing to correct the inconsistency. The Court of Appeals misstates that the jury found fraudulent concealment only until December 14, 1960 (App. A, pp. 20-21), and thus ignores the problem of the inconsistency.

Quite apart from their inconsistency, the jury's findings are plainly irrational. Nothing relevant to Mt. Hood's discovery of its claims occurred on or around December 14, 1960, but that just happened to be four years to the day before the government filed its petition for leave to intervene in Mt. Hood's ICC proceedings. Thus, a finding plainly based upon something other than evidence was a critical part in the elaborate construct by which the decision below extended the damage period to a full twenty years.

36. In fact, the Court of Appeals even upheld an instruction on fraudulent concealment by which the jury was told that Mt. Hood "had the right to rely" upon such denials and representations. (Tr. 6777-6778)

of his constructive knowledge of the fraud nor fulfill his duty to investigate by going to the party he suspects of the fraud. He cannot desist from further investigation because he is reassured of the truth of the original representations." *Feak v. Marion Steam Shovel Co.*, 84 F.2d 670, 673 (9th Cir.), *cert. denied*, 299 U.S. 604 (1936).

"[M]ere nondisclosure or denial of the existence of a conspiracy does not constitute fraud or deceit for tolling purposes. If it did, the tolling exception to the statute of limitation would eclipse the basic statute itself." *Hall v. E. I. Du Pont De Nemours & Co.*, 312 F.Supp. 358, 362 (E.D.N.Y. 1970)[37]

The Court of Appeals' explanation that "the jury weighed the evidence" and found fraudulent concealment (*see* App. A, p. 21, n.28) obviously begs the question. The question is not what a plainly confused jury *did* conclude. The question is: under the law, *should it have been permitted* to reach such a conclusion given the degree of Mt. Hood's knowledge and suspicion recognized even by the Court of Appeals? (pp. 32-33, above)

The Ninth Circuit's attempt to explain away Mt. Hood's admitted knowledge of Greyhound's violations of consent decrees is no more satisfactory. It says Mt. Hood's knowledge of conduct in violation of the consent decrees is not equivalent to notice of the alleged antitrust violations because violations of consent decrees are

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37. *See also Suckow Borax Mines Consolidated v. Borax Consolidated, Ltd.*, 185 F.2d 196, 209 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951); *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742, 752 (9th Cir. 1936), *cert. denied*, 299 U.S. 613 (1937); *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 341 (5th Cir. 1971) (plaintiff suspected he had a cause of action. "The bells do not toll the limitations statute while one ferrets the facts."); *Falls Sand & Gravel Co. v. Western Concrete, Inc.*, 270 F.Supp. 495, 504 (D. Mont. 1967); *Philco Corp. v. Radio Corp. of America*, 186 F.Supp 155 (E.D. Pa. 1960).

not in themselves violations of the antitrust laws. (App. A, pp. 21-22) But that misses the point. The point is that *in this case*, according to the Court of Appeals itself, the practices which violated the consent decrees were ". . . the same as or similar to those charged in this suit." (App. A, p. 19) Therefore, Mt. Hood's knowledge of violations of the consent decrees necessarily was knowledge of the practices which are its antitrust claim here, and what one knows is not concealed from him. Conversely, if those acts in violation of the consent decrees were not violations of the antitrust laws, neither are the acts upon which this suit is based—they are the same acts.

This Court has never considered the circumstances under which fraudulent concealment may toll the statute of limitations in a private antitrust case. Indeed, this Court has never even considered whether the equitable doctrine of fraudulent concealment can be used at all to toll the four-year limitations period prescribed in the Clayton Act. 15 U.S.C. § 15b.[38] The decision below announces a theory of fraudulent concealment that could eviscerate the statute of limitations in nearly all cases. It is time for this Court to address the question and define the role of fraudulent concealment in antitrust cases.

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38. Chief Justice Burger, in considering that issue as a Circuit Judge, said:

"Certainly some members of Congress thought they were accomplishing the result usually sought by the framers of statutes of limitations—the cutting off of stale claims . . . .

"I concur in our holding [that the statute of limitations can be tolled by fraudulent concealment] with considerable reservation and on the assumption that at some stage the Supreme Court must reexamine the problem and resolve it." *Westinghouse Elec. Corp. v. City of Burlington, Vermont*, 326 F.2d 691, 692-693 (D.C. Cir. 1964) (Burger, J., concurring specially).

See generally Note, *Fraudulent Concealment and Section 4(b) of the Clayton Act*, 49 U.Va.L.Rev. 276 (1963); Comment, *Clayton Act Statute of Limitations and Tolling by Fraudulent Concealment*, 72 Yale L.J. 600 (1963).

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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October 24, 1977.

Appendix

Appendix A

Decision and Opinion of the Court of Appeals

MT. HOOD STAGES, INC., dba Pacific Trailways, Plaintiff-Appellee,

v.

The GREYHOUND CORPORATION and Greyhound Lines, Inc., Defendants-Appellants.

No. 74-1282.

United States Court of Appeals, Ninth Circuit.

June 9, 1977.

Appeal from the United States District Court for the District of Oregon.

Before BROWNING and WRIGHT, Circuit Judges, and LINDBERG,* District Judge.

BROWNING, Circuit Judge:

Greyhound Corporation and Greyhound Lines, Inc., appeal from a judgment entered on a jury verdict awarding damages to Mt. Hood Stages, Inc., for injuries resulting from violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.[1] We affirm.

I.

Immunity

Greyhound is the largest common carrier by bus of passengers and package express in the United States, moving more than 80 percent of this traffic in the western states and operating over

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*Honorable William J. Lindberg, Senior United States District Judge, Western District of Washington, sitting by designation.

1. The judgment was for $13,146,090 (after trebling) and attorneys' fees of $1,250,000, plus costs.

routes throughout the country. Mt. Hood is one of Greyhound's small competitors, operating over routes in Oregon, Idaho, and Utah. The essence of Mt. Hood's antitrust claim is that Greyhound acquired bus companies whose routes circled those of Mt. Hood and thereafter deprived Mt. Hood of connecting or "bridge" traffic with the purpose and effect of eliminating Mt. Hood as a substantial competitor.

Greyhound does not deny the sufficiency of the evidence to establish a violation of sections 1 and 2 of the Sherman Act, assuming that statute applies. Its principal contention is that Mt. Hood bases its claim upon acquisitions approved by the Interstate Commerce Commission and implementation by Greyhound of control over the acquired companies, and that such activities are immune from antitrust attack by virtue of section 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11), applied in light of the Supreme Court's analysis in *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), provides that one carrier may acquire another with Commission approval; the Commission is required to grant such approval, subject to any terms and conditions it deems reasonable, if the acquisition "will be consistent with the public interest," *id.* Section 5(11) provides that carriers participating in transactions approved by the Commission are "relieved from the operation of the antitrust laws . . . insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

From 1947 to 1956 Greyhound acquired eight bus companies operating in the area relevant here. Each acquisition was approved

by the Commission pursuant to section 5(2). Mt. Hood opposed four of the acquisitions. It argued that if the acquisitions were approved, Mt. Hood would be encircled and Greyhound could route traffic around it, depriving the public of the most convenient service and Mt. Hood of revenues necessary to its survival. Mt. Hood's argument to the Commission thus foreshadowed its present antitrust claim.

Greyhound responded by representing to the Commission that the acquisitions "would not adversely affect connecting carriers; that arrangements with such carriers, including interchange of traffic and open gateways, would be maintained; that it was not the policy of Greyhound to route passengers over circuitous routes; that its agents were instructed to quote the direct route as well as the Greyhound route and give passengers their choice; and that Greyhound had always carried [Mt. Hood's] schedules in its folders and cooperated in every way to acquaint the public with its service and thus promote additional traffic and business for their lines."[2] Greyhound also represented to the Commission that Greyhound would continue a joint through-bus arrangement with Mt. Hood.[3] As the Commission later found, Greyhound intended the Commission to rely upon these representations in determining whether the proposed acquisitions were in the public interest, and the Commission did in fact rely upon them in approving the acquisitions.

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2. The quotation is from the Commission's opinion in the section 5(9) proceedings, described later. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 452 (1968).

3. This agreement, initiated in 1949, provided for a through-bus from San Francisco, California, to Spokane, Washington, using Mt. Hood's bridge route between Klamath Falls and Biggs, Oregon. Revenue and expenses were shared according to the miles traveled over each company's route. The arrangement shortened the San Francisco-Spokane trip by 110 miles and several hours as compared with the all-Greyhound route via Portland. It provided better service to travelers and was profitable for both companies.

In 1964 Mt. Hood filed a petition with the Commission pursuant to section 5(9) of the Act, 49 U.S.C. § 5(9),[4] asking it to reopen the acquisition proceedings and enter a supplemental order requiring Greyhound to live up to its representations. The allegations in Mt. Hood's petition to the Commission were essentially the same as those Mt. Hood later made in this antitrust suit—namely, that Greyhound had cancelled the through-bus connection, had scheduled connecting service so as to preclude reasonable connections with Mt. Hood, had directed Greyhound's agents and independent joint ticket agents to send traffic by longer routes around those of Mt. Hood, and had interfered in various ways with the distribution of Mr. Hood's schedules and the quotation of Mt. Hood's rates and services, all with the intent of injuring Mt. Hood. The United States intervened in support of Mt. Hood.

After an extensive evidentiary hearing, a hearing examiner resolved all issues against Greyhound and recommended entry of the order sought by Mt. Hood. In April, 1968, the Commission issued an opinion sustaining the examiner's findings that Greyhound had made the representations alleged, that Greyhound had intended the Commission to rely on them, that the Commission had relied on them in approving the acquisitions, that Greyhound had not fulfilled the representations, and that Greyhound's actions "were inspired by a desire to stifle competition" and "injure or destroy" Mt. Hood. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 459-63 (1968). The Commission concluded that Greyhound's failure to abide by its commitment "constitutes destructive competition in contravention of the national transportation policy, is not consistent with the public interest, and provides good cause" for a supplemental order under section 5(9) of the Act. The Commission deferred

4. Section 5(9) reads:
Supplemental orders by Commission.—The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

entry of a supplemental order to allow voluntary negotiations between the parties. *Id.* at 462-63.

Two months later, in July, 1968, Mt. Hood filed this suit alleging violations of the antitrust laws and common law and statutory unfair competition. With respect to the antitrust violations the complaint alleged that, beginning in 1947 and continuing to the date of the complaint, Greyhound had restrained and monopolized commerce in the carriage of passengers and their luggage between points in Oregon, Idaho, and Utah by means essentially the same as those that were the subject of the Commission's proceeding; that is, the acquisition of independent bus lines with Commission consent obtained by the misrepresentations outlined by the Commission and thereafter engaging in the destructive competitive tactics found by the Commission. Greyhound sought, unsuccessfully, to eliminate these issues from the litigation on the ground that they fell within the exclusive jurisdiction of the Commission.

In the Commission proceedings, meanwhile, the efforts of the parties to agree upon an order failed. The Commission entered its own order requiring Greyhound to restore the practices and traffic patterns existing when the acquisitions at issue were authorized, and, specifically, to restore the joint through-bus service, to revise Greyhound's schedules to permit reasonable connections with Mt. Hood, to see that through routes and fares were quoted and quoted accurately, and to eliminate other destructive practices. *Greyhound Lines, Inc. v. United States*, 308 F.Supp. 1033, 1037 (N.D. Ill. 1970). A three-judge district court affirmed the Commission and issued its own order in similar terms. *Id.* at 1040-41. Following entry of the district court order enforcing the Commission decision, Mt. Hood amended the complaint in this antitrust proceeding to eliminate the prayer for injunctive relief.

In June, 1971, the United States and the Commission filed petitions with the district court in the enforcement proceeding, asking that Greyhound be held in contempt for failing to comply with

the court's order enforcing the Commission's decision. The court found Greyhound had willfully failed to comply with portions of the order and held Greyhound in criminal and civil contempt. *United States v. Greyhound Corp.*, 363 F.Supp. 525 (N.D.Ill. 1973). The court imposed fines totaling $600,000, *United States v. Greyhound Corp.*, 370 F.Supp. 881, 883-85 (N.D.Ill.1974), ordered Greyhound to file semiannual reports of compliance efforts for five years, and granted members of the Department of Justice staff "visitorial and document examination rights so that they may further monitor Greyhound's compliance efforts," *id.* at 886. Because Greyhound appeared to be attempting to comply fully, no further injunctive relief was ordered.

While the proceeding to enforce the Commission's order was in progress, this antitrust case had come to trial and concluded with the verdict in Mt. Hood's favor. The opinion of the court in the enforcement proceeding noted that "many of Greyhound's actions that were found to be in violation of the order, were also found to be in violation of the antitrust laws" in this private suit. *Id.* at 884 n. 2. The enforcement court denied Mt. Hood's prayer for damages for expenses related to the contempt action and for injury to its business as a result of the contempt, on the ground that the damages awarded in this antitrust proceeding "will adequately compensate [Mt. Hood] for any damages it may have also suffered as a result of Greyhound's contempt. This is particularly true since many of the same acts of Greyhound that were found to be contemptuous were also involved in the private antitrust case." *Id.* at 888. The court of appeals affirmed the criminal contempt convictions, stating, "the record of this case shows a flagrant disregard of a court order" that was intended "to insure that Greyhound would comply with representations it made at the acquisition hearings and cease its predatory practices toward Mt. Hood." *United States v. Greyhound Corp.*, 508 F.2d 529, 540-41 (7th Cir. 1974).

From this recital it is evident that the conduct underlying the regulatory proceedings and that underlying the antitrust suit are essentially the same. The Commission's authority to regulate this conduct is not challenged.

Whether conduct Congress has made subject to administrative regulation is exempt from the antitrust laws depends upon Congress' intent. No direct evidence of a congressional intent relevant here has been cited.[5] The only applicable statutory language dealing with the question of antitrust immunity is that found in section 5(11), quoted above. The conduct charged in this action is not within the express exemption afforded by sections 5(11), particularly because provisions of this kind are strictly construed.[6] Since the Commission approved the acquisition in reliance upon Greyhound's commitment that the conduct underlying the antitrust complaint would not occur if the acquisitions were approved, it can hardly be argued that antitrust immunity for such conduct is "necessary" to enable Greyhound "to carry into effect the transaction so approved . . . and to hold, maintain, and operate any properties and exercise any control . . . acquired through such transaction."

The inclusion of this express exemption in the statute implies a congressional intention that conduct not within the exemption remains subject to the antitrust laws.[7] But this conclusion does not always follow; despite a grant of express immunity that does not

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5. The subject of antitrust immunity was touched upon briefly during the House debates. 58 Cong.Rec. 8593-94 (1919). The scope of the immunity was not discussed. Representative Sanders assured other House members that the antitrust laws were not being "wiped out"—that a merger will only be allowed if it would benefit the public. *Id.*

6. *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316, 76 S.Ct. 937, 100 L.Ed. 1209 (1956).

7. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 216-17, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966); *United States v. Borden Co.*, 308 U.S. 188, 201, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

cover the conduct charged, antitrust immunity may still be implied.[8]

Because of the "fundamental national policies embodied in the antitrust laws," *Otter Tail Power Co. v. United States,* 410 U.S. 366, 374, 93 S.Ct. 1022, 1028, 35 L.Ed.2d 359 (1973), however, repeal of those laws is not lightly implied from congressional adoption of a regulatory scheme.[9] Conduct is not immunized merely because it falls within the jurisdiction of the regulatory agency,[10] as it did in this case. Immunity is not implied merely because the applicable regulatory standard requires the agency to give weight to antitrust policy,[11] as it did in this instance.[12]

8. *See International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.,* 518 F.2d 913, 918-19 & n. 24 (9th Cir. 1975). *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), the decision relied upon most heavily by Greyhound, involved an express exclusion, and it is not entirely clear that the conduct that case held to be immunized from the antitrust laws was within the express exclusion, narrowly construed. The Court suggested as much when it noted, "a statutory scheme that does not create a total exception from antitrust laws may, nonetheless, in particular and discrete instances *by implication* grant immunity from an antitrust claim." *Id.* at 385 n. 14, 93 S.Ct. at 660 (emphasis added). The Supreme Court has twice cited *Hughes Tool* as a case in which immunity was implied. *See Gordon v. New York Stock Exch., Inc.,* 422 U.S. 659, 682, 95 S.Ct. 2598, 45 L.Ed. 2d 463 (1975); *United States v. National Ass'n of Sec. Dealers, Inc.,* 422 U.S. 694, 734-35, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975).

9. *United States v. National Ass'n of Sec. Dealers, Inc.,* 422 U.S. 694, 719-20, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350-51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

10. *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 596-97 n. 36, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Gordon v. New York Stock Exch., Inc.,* 422 U.S. 659, 692, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975) (Stewart, J., concurring); *Otter Tail Power Co. v. United States,* 410 U.S. 366, 372, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

11. *Gulf States Util. Co. v. Federal Power Comm'n,* 411 U.S. 747, 758-60, 93 S.Ct. 1870, 36 L.Ed.2d 635 (1973); *Otter Tail Power Co. v. United States,* 410 U.S. 366, 373, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

12. *Port of Portland v. United States,* 408 U.S. 811, 841, 92 S.Ct. 2513, 33 L.Ed.2d 723 (1972); *Northern Lines Merger Cases,* 396 U.S. 491, 511-16, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970); *McLean Trucking Co. v. United States,* 321 U.S. 67, 83-87, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

The applicable interpretative standard was restated by the Supreme Court in *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 597, 96 S.Ct. 3110, 3120, 49 L.Ed.2d 1141 (1976): "The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory act work, 'and even then only to the minimum extent necessary.' "[13] As the Court had written in the preceding term, "Certain axioms of construction are now clearly established. Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659, 682, 95 S.Ct. 2598, 2611, 45 L.Ed.2d 463 (1975).[14]

Applying these standards, we find no reason to imply immunity here. No "plain repugnancy" exists between the Interstate Commerce Act and the Sherman Act as applied to Greyhound's conduct, and it is not necessary to exempt Greyhound's conduct from antitrust restraints "to make the [Interstate Commerce Act] work." This is evident from the course taken in the administrative and judicial proceedings under both statutes. Clearly there has been no conflict between the regulatory and antitrust regimes. On the contrary, they have accommodated and supplemented each other. The policies of both have been advanced. There has been initial resort to the Commission for an application of its expertise to the factual issues relevant to whether application of the anti-

13. *Quoting Silver v. New York Stock Exch.,* 373 U.S. 341, 357, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

14. *Quoting United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350-51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). *See International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.,* 518 F.2d 913, 918-19 (9th Cir. 1975).

trust laws would be incompatible with regulatory objectives, *see Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973), and the Commission has unqualifiedly indicated that it has not approved and continues to disapprove Greyhound's conduct under regulatory standards applied in the light of antitrust principles. *See Mt. Hood Stages, Inc.,* 104 M.C.C. 449, 458, 460-63 (1968) (citing *Marnell v. United Parcel Service of America, Inc.,* 260 F.Supp. 391 (N.D.Cal.1966)).

The remedies afforded under the two statutes have also meshed. The injunction issued in enforcement of the regulatory determination was not duplicated in the antitrust proceeding. In assessing the penalty for contempt for violation of that injunction, the court was careful to avoid the possibility of double damages. *See United States v. Greyhound Corp., supra,* 370 F.Supp. at 888. The losses sustained by Mt. Hood during the contempt period (approximately February 5, 1970, to March 15, 1973, see *id.* at 884 n.2) were only a small part of the total damages Mt. Hood sustained from the inception of Greyhound's wrongful conduct in 1947. The remaining damages could be and were recovered only in the antitrust action. Trebling the damages—an effective support for the competitive policy reflected in both statutes—could be and was accomplished only in the antitrust proceeding. Since the transactions involved offended the policies of both statutes and those policies were advanced and not impaired by the application of both statutes, it is reasonable to assume Congress would have intended both to apply.

Greyhound leans heavily upon *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973). From this decision Greyhound draws the general principle that when antitrust immunity is conferred by a statute upon participants in an acquisition approved by a regulatory agency, the immunity extends to conduct made possible by the acquisition whether or not the conduct itself was approved, at least where the agency considered the possibility such conduct might occur and retained continuing jurisdiction to regulate it in the public interest.

But antitrust exemption is implied "*only* to the *minimum* extent necessary" to make the regulatory scheme work (emphasis added). Quoting this principle, and citing *Hughes Tool* and *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), the Supreme Court recently wrote, "[W]e have implied immunity *in particular and discrete instances* to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *United States v. National Association of Securities Dealers, Inc.,* 422 U.S. 694, 734-35, 95 S.Ct. 2427, 2450, 45 L.Ed.2d 486 (1975) (emphasis added).

Greyhound's generalization may accommodate the facts of both *Hughes Tool* and the present case, but it omits the distinguishing particulars that made antitrust immunity appropriate in *Hughes Tool* and would make it inappropriate here. The crux of the distinction between the two cases is that, as the Supreme Court viewed the record in *Hughes Tool,* the regulatory agency involved had considered the type of conduct which underlay the antitrust complaint and had approved it as in the public interest;[15] a successful antitrust suit therefore necessarily would have been repugnant to operation of the regulatory scheme. The opposite is true in this case; the Interstate Commerce Commission did not contemplate Greyhound's challenged conduct as likely to occur and thus did not approve such conduct when it approved the acquisitions.[16] The Commission also subsequently disapproved that conduct.

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15. *See In re REA Express, Inc.,* 412 F.Supp. 1239, 1261 (E.D.Pa. 1976); *Air Freight Haulage Co. v. Ryd-Air, Inc.,* 408 F.Supp. 446 (S.D.N.Y. 1976).

16. *See Scroggins v. Air Cargo, Inc.,* 534 F.2d 1124, 1131 (5th Cir. 1976).

In *Hughes Tool* the Civil Aeronautics Board issued orders approving acquisition of control of TWA by Hughes Tool Co. The applicable statute relieved persons affected by such an order from operation of the antitrust laws so far as necessary "to do anything authorized, approved or required by such order." Section 414, Federal Aviation Act, 49 U.S.C. § 1384. The agency-authorized control later ended, and an antitrust suit was brought by TWA against Hughes Tool Co. based upon transactions between the two during the period of Hughes Tool Co.'s control. The antitrust complaint alleged, in effect, that the controlling company had exercised its control to dictate the completion of the transactions in a way that injured the controlled company.

Hughes Tool Co.'s control of TWA was acquired in two steps —an initial acquisition of 45.6 percent of TWA's stock, and a later acquisition increasing Hughes Tool Co.'s holdings to 80 percent. Both acquisitions were approved by the Board. In hearings relating to the second acquisition the Board examined the manner in which Hughes Tool Co. had exercised its *de facto* control over TWA in the earlier period, particularly with respect to the acquisition of new flight equipment, which was the subject matter of the transactions on which the antitrust suit was based. The Board conceded allegations of abuse of the kind alleged in the antitrust complaint. Nonetheless, the Board concluded that continuation and enhancement of Hughes Tool Co.'s control was in the public interest. Moreover, the Board's order required that all substantial sales transactions between the two companies be submitted to the Board for approval, and, pursuant to this requirement, the transactions upon which the antitrust complaint rested were submitted to the Board and approved as in the public interest.

The Supreme Court noted that the subject matter of the Board's approval had been the acquisition and exercise by Hughes Tool Co. of control over the same kind of transactions as those at issue. *Hughes Tool, supra*, 409 U.S. at 386, 93 S.Ct. 647. By its approval

the Board had determined that such control was in the public interest and consistent with the regulatory statute's prohibitions against monopoly and restraining competition. Sections 102(c) and 408(b), Federal Aviation Act, 49 U.S.C. §§ 1302(c) and 1378(b).[17] The Court further noted that the Board had also approved the very transactions underlying the antitrust suit as meeting the same standard. 409 U.S. at 379, 387, 93 S.Ct. 647.

An antitrust suit challenging these transactions, the Court said, would seek "to negate what the Board, after full investigation, had found consistent with § 408's anti-monopoly provision, consistent with § 102's competition standard, and consistent with the public interest." *Id.* at 388, 93 S.Ct. at 661. TWA's antitrust suit sought "to terminate a relationship the continuation of which the Board had found essential to both TWA and the public interest and to penalize the type of conduct which the Board expressly contemplated and preferred would continue unless and until a different order from the Board was forthcoming." *Id.*[18] The Court concluded that the transactions were exempt from suit under the Sherman Act.[19]

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17. Acquisition of control of one company by another necessarily contemplates exercise by the parent of control over the internal business operations of the subsidiary. When the agency has approved acquisition of control, exclusive agency jurisdiction over its exercise is more readily implied. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 385-86, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), *citing Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), as such a case.

18. *See also Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 309, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963).

19. The Court summarized its holding in almost identical language at two points in the opinion:

At pages 387-88, 93 S.Ct. at page 661, the Court said:

> We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws. . . . But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where it specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in

In sum, in *Hughes Tool,* the propriety under the regulatory statute of the activity challenged in the antitrust suit (control by Hughes Tool Co. of the manner in which its TWA subsidiary acquired new aircraft) was the central issue presented to the agency for consideration in the exercise of its regulatory authority, and the agency had resolved the issue by approving such control as in the public interest. Exemption from the antitrust laws was implied because a successful application of the antitrust laws to the conduct would have negated the regulatory agency's determination and faced the regulated carrier with inconsistent governmental commands. In the present case, as has been seen, the premise of inconsistent regulatory and antitrust demands is absent. Also unlike *Hughes Tool,* the instant suit is not brought by a subsidiary against its parent and does not challenge the effect on the

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which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. As noted, the parent company which controls an air carrier is subject to pervasive control by the CAB. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

And again at page 389, 93 S.Ct. at page 661-662:

> We by no means hold that the Federal Aviation Act completely displaces the antitrust laws. *Pan American,* 371 U.S., at 305, [83 S.Ct. at 482]. But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where the CAB specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

acquired company of the daily intercompany control that was integral to the acquisition. *See also Pan American World Airways v. United States,* 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963). Rather, the instant suit is brought by a third party to the approved acquisitions, challenging conduct with regard to the third party that not only was not integral to the Commission's acquisition approvals but was violative of specific representations made by Greyhound at the acquisition hearings. In these circumstances, Greyhound's conduct is not immune from antitrust strictures.

II.

Jury Instructions and Admission of Evidence

Many of Greyhound's assertions of error in evidentiary rulings and instructions rest upon Greyhound's theory of antitrust immunity and fall with it.

Greyhound complains of the district court's "failure to instruct on Section 5(11)." It is not clear precisely what Greyhound has in mind. The extent to which Greyhound's conduct was exempt from the antitrust laws by the Interstate Commerce Act was a legal question, not an issue of fact for the jury.[20] The instructions proposed by Greyhound were properly rejected for this reason and because they reflected Greyhound's uncompromising position that the acquisitions approved by the Commission and all conduct involving exercise of control over the acquired carriers were exempt from the antitrust laws and were not to be considered by the jury for any purpose whatever.[21]

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20. *See Gordon v. New York Stock Exch., Inc.,* 422 U.S. 659, 688, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975).

21. For example, Greyhound requested an instruction that since the Commission had approved the acquisitions, "the manner in which defendants have used or exercised the control of these carriers" was within the exclusive jurisdiction of the Commission, and therefore the jury "must exclude from [its] consideration all conduct by defendants involving exercise of control over the acquired bus companies." Greyhound also requested instructions referring to the specific conduct the Commission

The court was required to provide the jury with standards to apply in determining whether Greyhound was liable under the antitrust laws, and it did so. The court defined the elements of monopolization, attempt to monopolize and unreasonable restraint of trade in the usual way, and Greyhound does not object to these instructions in themselves. The court also told the jury that the fact that Greyhound was regulated affected what activities of Greyhound were subject to the antitrust laws; that in a regulated industry the existence of monopoly power was not evidence of monopolization, but "use of monopoly power even if lawfully acquired, to foreclose or restrain competition, to gain a competitive advantage or to eliminate a competitor" was such evidence.[22] Under these instructions the jury could not base a finding of monopolization on the approved acquisitions themselves; improper use of the acquired power was required. This was at least as favorable to Greyhound as the law warranted.

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had condemned, and telling the jury that regulation of such conduct was within the exclusive jurisdiction of the Commission and could not be the basis of any findings by the jury.

In addition, Greyhound requested an instruction essentially in the words of the statute, telling the jury that the antitrust laws did not apply to the approved acquisitions "or to anything done by defendants which was necessary to hold, maintain or operate the properties or operating rights obtained in these approved transactions." Since the scope of the immunity conferred by the statute was a legal question for the court to decide, this instruction was properly refused. *See* note 20, *supra,* and related text. The court's decision as to the scope of the statutory immunity shaped and conditioned the court's instructions spelling out what facts the jury must find before Greyhound could be held liable.

22. The quoted portion of the instruction is settled law. *See Otter Tail Power Co. v. United States,* 410 U.S. 366, 377, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *United States v. Griffith,* 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1948). Indeed, section 2 is violated if exclusionary tactics are used to maintain a lawfully acquired monopoly. *Industrial Building Materials, Inc. v. Interchemical Corp.,* 437 F.2d 1336, 1344-45 (9th Cir. 1970), *interpreting United States v. United Shoe Machinery Corp.,* 110 F.Supp. 295, 343 (D.Mass. 1953), *aff'd per curiam,* 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954). *See also TV Signal Co. v. American Tel. & Tel. Co.,* 462 F.2d 1256, 1261 (8th Cir. 1972).

Greyhound objects to the admission of evidence regarding the administrative and related court proceedings, and to jury instructions that this evidence could be considered "in determining the issue of Greyhound's motive, intent and purpose and reasonableness of its behavior." Greyhound objects on several grounds, but primarily on the basis of Greyhound's immunity argument, which we have rejected. Greyhound's other objections are also without merit.[23] The evidence was properly used for the purpose stated by the court.

The lengthy instructions contained two brief passages apparently inspired by *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172, 177, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965), and *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). Greyhound argues that these passages permitted imposition of liability if the jury found no more than that Greyhound had perpetrated a fraud on the Commission or had acted in bad faith in the administrative and related judicial processes, rendering those processes ineffective. Even considered alone, however, both passages also required the jury to find, as a condition of liability, that the fraud or abuse of process resulted in an administrative order that conferred a monopoly or an unreasonable competitive

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23. One of these additional grounds of objection warrants brief comment. Greyhound argues that the instructions permitting use of evidence of the administrative proceedings in determining Greyhound's intent and the reasonableness of its conduct "infringe" Greyhound's constitutional privilege to seek relief before administrative agencies, *citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). But "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 514, 92 S.Ct. 609, 613, 30 L.Ed.2d 642 (1972). The antitrust laws have been applied in many factual contexts that included utilization of administrative processes by the antitrust violator. *See, e.g., Otter Tail Power Co. v. United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.,* 489 F.2d 293 (9th Cir. 1973).

advantage upon Greyhound. At most, therefore, the only question raised by these passages is whether the doctrine of *Walker Process* applies outside the patent field.

When the passages are read in light of the parties' contentions, the evidence in the case, and the instructions as a whole, however, we do not believe they present even this issue. Mt. Hood did not contend that the acquisitions themselves or the power Greyhound gained through them, standing alone, constituted a violation of the antitrust laws. Mt. Hood relied instead upon Greyhound's exclusionary practices made possible by the acquisitions. The instructions were generally to the same effect. The jury was not instructed on any theory that Greyhound's purchase of other carriers might constitute the unlawful acquisition of monopoly power. On the contrary, as we have seen, the jury was told that in such a regulated industry the mere possesion of monopoly power did not violate the Sherman Act, and that abuse of monopoly power to eliminate competition was required. The only fraud or abuse of process presented by the evidence was that Greyhound represented to the Commission that it was not using and would not use any of the acquired routes to engage in the predatory practices we have outlined earlier, and that Greyhound nonetheless did so. Since these same predatory practices underlay Mt. Hood's antitrust claim, since the instructions also conditioned liability upon a finding of monopolization or unreasonable restraint of competition defined in the usual way, and since the judge properly ruled without submitting the issue to the jury that Greyhound's challenged conduct was not immunized from antitrust attack, the passages amounted to no more than a reiteration in another form of the general instruction that unreasonable restraint of competition or use by Greyhound of monopoly power to foreclose or restrain competition would violate the antitrust laws.[24]

24. Thus even if appellant was entitled to an instruction that "fraud" must be proven by "clear and convincing" evidence, as Greyhound urges, failure to give it was harmless under Fed.R.Civ.P. 61.

Greyhound attacks the use made at trial of two antitrust consent decrees entered into by Greyhound and the United States. The decrees, which were admitted in evidence, prohibited Greyhound from refusing to establish through-routes with competitors and from continuing other practices the same as or similar to those charged in this suit. The jury was told it could consider the decrees and Greyhound's conduct with respect to obeying or disobeying them in determining the issues of Greyhound's intent and purpose and the reasonableness of Greyhound's behavior.

A trial judge must be accorded "wide latitude" in determining the relevance of evidence in antitrust cases. *Gray v. Shell Oil Co.*, 469 F.2d 742, 751 (9th Cir. 1972). The admissibility of a consent decree is a matter committed to the court's discretion. See *Control Data Corp. v. IBM Corp.*, 421 F.2d 323, 326 (8th Cir. 1970). *See also Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 146 (3d Cir. 1938). There was no abuse of discretion here. The court warned the jury of the limitations implicit in decrees entered into by consent, and confined their use to a proper purpose.

Greyhound's claim that the jury should not have been asked to determine whether Greyhound had a dominant share of the market because Greyhound's market share resulted from ICC-approved transactions is but another reflection of Greyhound's rejected theory of immunity.

Other objections to the instructions regarding the relevant market are without merit. While it is true that the court did not refer to the "interchangeability of services" in those terms, the court accomplished the same purpose by use of illustrations and by instructing the jury that a "relevant" market must be one for a "distinct service" with "peculiar characteristics," serving "distinctive purposes," with "dissimilar" price characteristics, and relatively "insensitive to price variations," so that an increase in bus fares would not result in large numbers of customers switching to other forms of intercity transportation. If these indices of distinctness were not found, the jury was told, intercity bus trans-

portation would not constitute a relevant market for antitrust purposes.[25]

III.

Statute of Limitations

The jury awarded Mt. Hood damages for injuries sustained from 1953 to 1973. The applicable statute of limitations, 15 U.S.C. § 15b, bars all claims on which suit is not commenced within four years after they accrue—in this case, all claims that accrued before July 5, 1964, since Mt. Hood's suit was filed on July 5, 1968. However, Mt. Hood asserts that the running of the limitations period was suspended from 1953 to 1960 by Greyhound's fraudulent concealment of its wrongdoing, and from 1964 to the date of suit by the intervention and participation of the United States in the section 5(9) proceedings brought by Mt. Hood before the Commission.[26]

In accordance with the universal rule, our circuit holds that fraudulent concealment of the existence of an antitrust cause of action tolls the four-year statute of limitations provided by section 15b.[27] The jury found Greyhound had fraudulently con-

25. Greyhound contends the jury was instructed as to several contentions for which there was no evidentiary support. We have examined the record with respect to each of these issues and conclude that either there was sufficient evidence to justify an instruction or the instruction was harmless under Fed.R.Civ.P. 61.

26. *See* note 4, *supra*, and related text. The period of fraudulent concealment and the government intervention tolling period can be "tacked" or "bridged" to suspend the statute for the entire period since the time between the two did not exceed four years, albeit short by only a day. *See, e.g. City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 460-61 (2d Cir. 1974); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 567-72 (10th Cir. 1962); *Maricopa County v. American Pipe & Constr. Co.*, 303 F.Supp. 77, 84-86 (D.Ariz.1969), *aff'd*, 431 F.2d 1145 (9th Cir. 1970).

27. *Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575 (9th Cir. 1964); accord. *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Crummer Co. v. Du Pont*, 255 F.2d 425 (5th Cir. 1958).

cealed its antitrust violations from 1953 to December 14, 1960, and that Mt. Hood neither knew nor should have known of these violations prior to December 14, 1960.

Greyhound does not deny the sufficiency of the evidence to show it attempted to conceal its conduct. It argues, however, that Mt. Hood had notice of Greyhound's activities long before December 14, 1960.

The record shows that Mt. Hood complained about quoting and routing practices of Greyhound agents on various occasions during the 1953-1960 period. The record also shows, however, that Greyhound continuously represented to Mt. Hood and to the Commission that these were isolated incidents not countenanced by Greyhound's management.[28]

The record shows that Mt. Hood suspected Greyhound of unlawful conduct prior to December 14, 1960, but "[s]uspicion will not substitute for knowledge of facts from which fraud could reasonably be inferred." *Friedman v. Meyers*, 482 F.2d 435, 439 (2d Cir. 1973).

There was evidence that Mt. Hood's president expressed concern over Greyhound's expansion by acquiring other carriers, and that he also stated his belief that the consent decrees were being violated. Awareness of Greyhound's growing dominance of the market was not equivalent to notice of monopolization, however, for the acquisitions were approved by the Commission and presumably immunized from the antitrust laws. Nor was knowledge

28. Greyhound argues that such representations, denials, and other attempts at concealment are immaterial citing such cases as *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742, 752 (9th Cir. 1936); *Feak v. Marion Steam Shovel Co.*, 84 F.2d 670, 673 (9th Cir. 1936). But as these cases demonstrate, attempts at concealment lose their relevance only when they occur after plaintiff already knew or should have known of the unlawful conduct. In the present case the jury weighed the evidence and concluded that, in part because of Greyhound's attempts at concealment, Mt. Hood neither knew or should have known of Greyhound's antitrust violation.

of violations of the consent decrees equivalent to such notice, for, as Greyhound itself is careful to point out, violations of consent decrees are not in themselves violations of the antitrust laws.

Greyhound asserts that Mt. Hood was charged with the duty to investigate once it became aware of facts from which antitrust violations should reasonably have been inferred.[29] But in the face of Greyhound's assurances and denials of responsibility, we cannot say as a matter of law that Mt. Hood's awareness of the growth of Greyhound's power through acquisitions and of the commission of predatory acts by some of Greyhound's agents amounted to notice of potential antitrust claims against Greyhound.

We conclude, therefore, that the trial court properly refused to set aside the jury's determination that Greyhound fraudulently concealed its antitrust violation, and that Mt. Hood had neither actual nor constructive knowledge of the violation until December 14, 1960.

Four years later, on December 14, 1964, one day before Mt. Hood's antitrust claim would have been barred, the United States intervened in the section 5(9) proceedings Mt. Hood had instituted before the Commission in October, 1964. The trial court held that, under the provisions of 15 U.S.C. § 16(i), the intervention and the subsequent participation by the United States in the Commission proceedings tolled the running of the statute of limitations until those proceedings terminated in 1974, well after the filing of the present suit.

Section 16(i) provides that running of the limitations period on a private cause of action is suspended during the pendency of "any civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust

29. *See* note 28, *supra*, and cases cited therein.

laws."[30] Greyhound argues that section 16(i) is inapplicable because the administrative proceedings were not "instituted by the United States" and because they were not proceeding "to prevent, restrain, or punish violations of any of the antitrust laws."

The literal wording of section 16(i) is not controlling. Where one possible interpretation of the language would effect the congressional purpose and another defeat it, the former is to be adopted. *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 321, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965). The clearly expressed purpose of section 16(i) is to further effective enforcement of the antitrust laws by permitting private litigants to have the benefits that may flow from governmental antitrust enforcement efforts. *Id.* at 320, 85 S.Ct. 1473. This purpose would be served by interpreting section 16(i) to encompass the government's intervention and participation in the section 5(9) proceedings before the Commission—a reading the language readily permits.

The proceedings were of a kind likely to produce benefits to Mt. Hood as a plaintiff in a subsequent antitrust suit.[31] The issues,

30. 15 U.S.C. § 16(i) reads in part:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

31. The question is not whether the government proceedings actually conferred benefits upon the private antitrust plaintiff, but whether the character of the proceedings was such that they were likely to do so. Thus in analyzing the issue the Supreme Court spoke of government action which "may aid the private litigant." *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 319, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965). If actual benefit were the test, it

as we have seen, were largely the same. Governmental investigative and legal resources were made available to fully develop the facts and the law favorable to the common position of the government and Mt. Hood on these issues. The successful resolution of these issues was critical to the defeat of Greyhound's claim of antitrust immunity.

It would make form controlling to hold section 16(i) inapplicable merely because Mt. Hood rather than the United States instituted the proceedings. The United States intervened little more than 60 days after the filing of Mt. Hood's petition and participated actively in all subsequent stages of proceedings that required nearly a decade to complete. Nothing would be gained, and a good deal of judicial and administrative time and efficiency would be lost, if the United States were compelled to institute a separate independent proceeding in district court under 15 U.S.C. § 26 to assure private treble damage litigants the benefits Congress intended they should have from the government's action. As the trial court concluded, "the Congressional intent behind [16(i)] is better served by treating intervention by Antitrust Division lawyers as the functional equivalent of a direct action by them."

In addition to relying on the language of the statute, Greyhound argues that section 16(i) applies only when the United States initiates rather than intervenes in a proceeding because of the Supreme Court's statement in *Minnesota Mining* that the purpose of section 16(i) is to permit private parties the benefit of *"prior government actions."* 381 U.S. at 320, 85 S.Ct. 1473 (emphasis by Greyhound). Obviously, the Court was referring only to actions occurring before the antitrust suit was commenced. Greyhound's argument epitomizes the kind of "grudging interpretation" which "would collide head-on with Congress' basic policy objectives." *Id.*

might be impossible to determine whether the government proceedings would toll the running of limitations until those proceedings were finally concluded. Private plaintiffs would be compelled to file their antitrust suits although government proceedings involving the same subject matter were still in progress.

When the substance of the government's intervention and participation before the Commission is examined, it falls fairly within the class of proceedings "to prevent, restrain, or punish violations of any of the antitrust laws" to which section 16(i) applies. It is not controlling that the government's action was taken in an administrative rather than judicial setting, *Minnesota Mining, supra,* 381 U.S. at 320, 85 S.Ct. 1473, nor that the proceedings were not brought under the antitrust laws, *Luria Steel & Trading Corp. v. Ogden Corp.,* 484 F.2d 1016, 1020-21 (3d Cir. 1973); *Rader v. Balfour,* 440 F.2d 469, 473 (7th Cir. 1971). The government action suspends the running of the limitation period under section 16(i) if it "is directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws," *Rader v. Balfour, supra,* 440 F.2d at 473, for it is government participation in such a proceeding that is likely to produce the benefits that Congress intended plaintiffs in later private treble damage actions to have.

The government's petition to intervene demonstrates that its interest lay in the possibility of antitrust violations should Mt. Hood's allegations prove correct. To explain its interest in the proceedings and its desire to participate as a party, the government stated:

> The allegations of the petition of Mt. Hood Stages, Inc. make a serious charge: that Greyhound has been permitted through the series of acquisitions the Commission approved in these proceedings to extend its system in all directions around Mt. Hood; that Greyhound has now begun to route around Mt. Hood over all Greyhound's routes traffic which it used to interchange with Mt. Hood or handle in through buses over shorter and quicker routes and to engage in numerous other acts and practices which as they are described in Mt. Hood's petition (pp. 8-9) have in the aggregate the appearance of a studied effort to force Mt. Hood out of business. . . .

The petition noted Mt. Hood's increasing vulnerability to and dependence on Greyhound. It referred to Greyhound's "predatory conduct" and to the possibility of Mt. Hood's "extinction at the hands of an infinitely more powerful rival." The petition concluded:

> Behind the immediate issues before the Commission are further issues of applicability of the antitrust laws. The Commission's approvals of the acquisitions relieved Greyhound and its officials from accountability under these laws only to the extent necessary to put the acquisitions into effect. While actions taken to give effect to the acquisitions are completely immune, exercise of economic power the acquisitions conferred so as to isolate and destroy a competitor is not.

As Greyhound itself admitted before the district court in its motion to dismiss the complaint, a purpose of the Justice Department's intervention was "to assure the adequate consideration of antitrust issues."

Antitrust issues were an appropriate part of the proceedings. The Commission was required to consider the anticompetitive effects of the section 5(2) transactions in framing, and modifying, its order.[32] Early in the proceedings Greyhound was reminded "that the antitrust laws and the national transportation policy . . . offer certain broad guidelines to be kept in mind in determining this proceeding." *Mt. Hood Stages, Inc., supra*, 104 M.C.C. at 451. The Commission rested its decision upon the conclusion that Greyhound's conduct "constitutes destructive competition in contravention of the national transportation policy." *Id.* at 463.[33] In sustaining the Commission's order the district court wrote:

32. *Port of Portland v. United States*, 408 U.S. 811, 841, 92 S.Ct. 2513, 33 L.Ed.2d 723 (1972); *Northern Lines Merger Cases*, 396 U.S. 491, 511-16, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970); *McLean Trucking Co. v. United States*, 321 U.S. 67, 83-87, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

33. The Commission rejected Greyhound's argument that Greyhound's practices were not in themselves unlawful on the basis of the antitrust principle that "actions which are not in themselves unlawful may be unlawful when they are part of a plan to monopolize or restrain commerce." *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 458 (1968). The Commission cited the Sherman Act case of *Marnell v. United Parcel Service of America, Inc.*, 260 F.Supp. 391 (N.D.Cal.1966).

> It is inconceivable to us that Congress intended that destructive practices made possible by acquisition approvals may not be corrected by supplemental order under Section 5(9), especially in light of the ICC's duty to take the antitrust policy of the United States into account in its decision making.

Greyhound Lines, Inc. v. United States, supra, 308 F.Supp. at 1038.

Because Congress' purpose in enacting section 16(i) will be served by this interpretation, and because the language of the section does not bar it, we conclude that the government's intervention in the section 5(9) proceedings on December 14, 1964, tolled the running of the limitations period from that date.[34] Accordingly, Mt. Hood's antitrust complaint was timely filed.

IV.

Damages and Attorneys' Fees

Greyhound contends that Mt. Hood failed to offer adequate proof either that Mt. Hood was injured by Greyhound's conduct or of the amount of the damage. With respect to the fact of damage, Greyhound's claim is frivolous. The jury may infer the fact of damage if "plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962). Mt. Hood offered evidence that its bridge traffic declined sharply during the relevant period.[35] Greyhound's conduct found to violate the antitrust laws was directed at creating

34. We need not reach Mt. Hood's contention that the statute was tolled to December 14, 1960, by virtue of Mt. Hood's commencement of the section 5(9) proceedings.

35. Mt. Hood offered evidence, for example, that Mt. Hood's bridge traffic consisted of 25,258 passenger trips, or approximately 44 percent of the total relevant bridge traffic, in 1963 and had fallen to 930 passenger trips, or approximately three percent of the total, by 1969.

precisely this kind of loss.[36] There was no indication of an alternative source of loss sufficient to negate an inference that Greyhound's violation was a material cause. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 23 L.Ed2d 129 (1969).

Mt. Hood's proof of the amount of damage was less certain, and necessarily so. What Mt. Hood's business volume and profits would have been except for Greyhound's antitrust violation is inescapably uncertain. *See Flintkote Co. v. Lysfjord*, 246 F.2d 368, 391 (9th Cir. 1957). In such a case, the amount of damages may be shown "as a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 249, 75 L.Ed. 544 (1931).

The premise of Mt. Hood's calculation of lost profits was that 95 percent of bus passengers would have traveled Mt. Hood's shorter bridge routes if they had had that choice. Greyhound asserts that Mt. Hood's premise "defies the record as well as common sense and is untenable," and therefore the entire calculation of damage fails. There was ample evidence from which the jury could reasonably infer that the shortest bus route is generally fastest, including studies comparing Greyhound's and Mt. Hood's schedules from 1950 to 1970 with regard to mileage and time.[37]

36. As described previously, Mt. Hood alleged and offered substantial evidence to prove that Greyhound had cancelled the north-south through-bus connection arrangement on which Mt. Hood depended for a substantial portion of its traffic, scheduled its services so as to preclude reasonable connections with Mt. Hood, directed independent and joint ticket agents to long-haul traffic around Mt. Hood, and interfered with distribution of Mt. Hood schedules.

37. These studies were part of a larger damage study commissioned by Mt. Hood. The study was supplemented by the testimony of three expert witnesses over a two-week period. The study was based on statistical computations verified by Arthur D. Little & Co., an independent management consulting firm. Mr. Jizmagian, Arthur D. Little & Co.'s representative who supervised the study, testified that maximum use was made of all available data supplied by Greyhound and where such data was not available every assumption and method "and every use of statistics and every use of ratios was done . . . with standard statistical techniques and there was, in my opinion, no speculative use of numbers." He concluded that the study accurately reflected Mt. Hood's damages.

Mt. Hood also introduced evidence from which the jury could reasonably infer that as a general rule 95 percent of bus passengers would take the fastest route when given a choice.[38] It is of course true that the evidence did not demonstrate to a certainty that 95 percent of passengers would have traveled Mt. Hood's shorter routes absent the restraints imposed by Greyhound's violation, but in the nature of the case proof to a certainty is not possible and is not required.

Greyhound challenges virtually every other facet of Mt. Hood's proof of damage. We have examined each of Greyhound's objections in light of Mt. Hood's response and the evidence in the record. No useful purpose would be served by a tedious recapitulation of these materials. We are satisfied that the evidence offered by Mt. Hood permitted the jury to make a reasonable and just inference of the amount of Mt. Hood's damage.[39]

We also sustain the award of attorneys' fees. Greyhound objects that the amount of the award divided by the number of hours devoted to the litigation by plaintiff's attorneys yields an exorbitant hourly rate. But as the experienced trial judge stated, "compensation at an hourly rate would be inadequate in a case of this kind," which "is, in many ways, unusual . . . its

38. For example, Mt. Hood's damage study, *see* note 37, *supra*, included a comparison of passenger utilization of three available " 'All Greyhound' routes from Oregon and Washington points to Los Angeles," showing that more than 95 percent of the bus passengers chose the shortest of the three available routes.

39. This holding also encompasses the damage awards for express traffic Mt. Hood lost between 1964 and 1971, and for local traffic it lost between 1964 and 1970.

complexity and difficulty set it apart from the common run of antitrust cases, if such a category in fact exists." The trial court based the award upon knowledge gained in four years' involvement in all aspects of the case, the evidence presented by the parties on this issue, and the factors prescribed in *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir. 1964). The award represented an appropriate exercise of the district court's discretion.

Affirmed.

Appendix B

Order Denying Rehearing

United States Court of Appeals
for the Ninth Circuit

Mt. Hood Stages, Inc., dba Pacific Trailways, Plaintiff-Appellee, v. The Greyhound Corporation and Greyhound Lines, Inc., Defendants-Appellants.	No. 74-1282

[August 3, 1977]

ORDER

Before: BROWNING and WRIGHT, Circuit Judges, and *LINDBERG, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

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*Honorable William J. Lindberg, Senior United States District Judge, Western District of Washington, sitting by designation.

Appendix C

District Court's Memorandum and Order

In the United States District Court
for the District of Oregon
Civ. No. 68-374

Mt. Hood Stages, Inc., doing business as Pacific Trailways,
Plaintiff,

v.

The Greyhound Corporation and Greyhound Lines, Inc.,
Defendants.

[November 29, 1973]

MEMORANDUM AND ORDER

GOODWIN, Judge:*

Greyhound has moved for a judgment notwithstanding the verdict and for a new trial in this treble-damage antitrust action which resulted in a verdict and judgment for Mt. Hood Stages. The principal issue is whether *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363 (1973), compels a judgment n.o.v.

Greyhound asserts:

(1) The action is barred by Section 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11);

(2) There was insufficient evidence (of conspiracy and of monopolization) to sustain the verdict;

(3) A new trial should be granted because of the numerous errors of law in the taking of evidence and in the instructions to the jury.

*The Honorable Alfred T. Goodwin, United States Circuit Judge, sitting as District Judge by designation.

All of these contentions rehearse issues which were briefed and argued extensively at trial and in hearings before trial. Now, as then, the law and the facts of this case are such that the issues must be resolved against the defendants. If there was error here or there in an evidentiary ruling, none was so prejudicial as to warrant the abortion of a lengthy trial. *See* Fed. R. Civ. P. 61.

The evidence revealed long-standing, calculated, and damaging conduct which, but for Section 5(11) of the Interstate Commerce Act, plainly would have violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

Mt. Hood proved, *inter alia*, that Greyhound had: (1) directed independent and joint ticket agents to long-haul traffic around Mt. Hood; (2) interfered with the distribution of Mt. Hood's schedules; (3) scheduled connecting service so as to preclude reasonable connections with Mt. Hood; and (4) discontinued through bus service important to Mt. Hood's scheduled routes.

The I.C.C. and reviewing courts have found that Greyhound willfully breached earlier representations made to the Commission in acquisition proceedings and engaged in destructive competition.[1] The destructive practices established by the record before the Commission were enjoined by a three-judge panel of a district court,[2] and Greyhound was subsequently held in criminal contempt for violating that injunction.[3] I mention these collateral

1. See, *e.g.*, Petition for Modification—Greyhound Mergers (Western Div.), 104 M.C.C. 449 (Div. 3, 1968); I.C.C. Affirmance of the Order of Division 3, No. MC-F-9136 (Dec. 11, 1968; April 14, 1969); *Greyhound Lines, Inc. v. United States*, 301 F.Supp. 356 (N.D. Ill. 1969) (denying motion for temporary restraining order).

2. *Greyhound Lines, Inc. v. United States*, 308 F. Supp. 1033 (N.D. Ill. 1970).

3. *United States v. Greyhound Corp.*, No. 71-CR-924 (N.D. Ill., June 27, 1973).

cases, not because I relied upon them in this case, but because they establish two points that do have some relevance to policy considerations that bear upon this case.

In the first place, the litigation before the Commission has proceeded for approximately a decade with no apparent impact upon Greyhound's conduct. If Congress intended the Interstate Commerce Act to provide a remedy for competitors injured by predatory behavior on the part of regulated carriers, then the legislation is woefully inefficient. Second, if proof outside the abundant proof in this record were needed, the collateral cases strip away any pretense that Greyhound's conduct toward its competitors was simply the result of good-faith aggressive management. The costs to Greyhound of the prolonged litigation before the Commission apparently have been more than offset by the profits Greyhound has derived by flouting the Commission's cease-and-desist orders. If there was ever a case in which a private action for damages is demonstrably necessary to carry out national antitrust policy, this is it.

Section 5(11) of the Interstate Commerce Act obviously is the key issue. That section provides, in relevant part:

> "* * * [A]ny carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction * * *." 49 U.S.C. § 5(11).

The effect of a similar statute on the antitrust liability of a supplier of airline equipment was recently decided by the Supreme

Court in *Hughes Tool Co. v. Trans World Airlines, supra.* When an agency, with the authority to immunize transactions from the operation of the antitrust laws, necessarily considers the public interest and approves conduct explicitly or implicitly before the agency as part of a proposed transaction, such conduct is thereby made immune from antitrust liability.

Mt. Hood poses the "flip side" of the *Hughes Tool* question: where a regulating agency with the authority to immunize conduct from the operation of the antitrust laws has not approved the conduct complained of, and indeed has ordered it stopped, does the approval by the agency of related transactions and the existence of a pervasive regulatory scheme, including the availability of some remedy, adequate or not, under that scheme preclude antitrust liability, I hold that it does not. *See Hughes Tool Co. v. Trans World Airlines*, 409 U.S. at 387:

> "We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws."

The Supreme Court has repeatedly made it clear that repeal of the antitrust laws is not to be lightly assumed. *See, e.g., Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350 (1963); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456-57 (1945). *See also Price v. Trans World Airlines*, 481 F.2d 844 (9th Cir. 1973) (post-*Hughes Tool Co.* antitrust action stayed pending resort to Civil Aeronautics Board).

Mt. Hood is not here seeking the kind of relief that could be provided by the I.C.C.[4] That kind of relief has been sought, and for nearly ten years has proven to be illusory. Here Mt. Hood is

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4. See 49 U.S.C. §§ 9, 16. Though the I.C.C. has jurisdiction to award damages, this power is limited to cases in which damages result from activity which can be classified as a violation of the Interstate Commerce Act. *National Trucking & Storage Co. v. Pennsylvania R.R.*, 228 F.2d 23, 30 (D.C. Cir. 1955).

seeking only the antitrust remedy of treble damages, relief that can be granted only in court and which is supplemental to those administrative remedies which could be ordered by the I.C.C.

The antitrust issues raised by Greyhound's conduct were not considered or passed upon by the Commission in the initial acquisition proceedings. Were this court to hold that merely because the I.C.C. has authority to approve acquisitions, routes and schedules and order some relief with respect to some of the conduct complained of Congress has thereby placed exclusive jurisdiction in the I.C.C. over all conduct related to the approved transactions, this would amount to an almost total exemption of a carrier's conduct from the antitrust laws. Rather, all that *Hughes Tool* teaches is that the substantive exemptions from the antitrust laws created by Congress or required by the structure of the regulatory scheme are not destroyed through by-passing or overriding the forum chiefly entrusted with the regulation of the industry in question. *See REA Express v. Alabama Great So. Ry.*, 412 U.S. 934 (1973) (affirming a three-judge court's *stay* of an antitrust suit pending I.C.C. reconsideration of a prior financing arrangement order on the issue of possible antitrust immunity).

A court's antitrust jurisdiction is ousted only when the specified agency, pursuant to its statutory authority, approves the challenged actions. If an agency thus grants an exemption from the antitrust laws, that determination is binding unless a court should set it aside for one of the reasons enumerated in Section 10(c) of the Administrative Procedure Act.[5] By the same token, however, conduct which not only has not been expressly approved but

5. *E.g.*, 5 U.S.C. § 706(2):
"(A) arbitrary, capricious, an abuse of discretion * * *;
"(B) contrary to constitutional right * * *;
"(C) in excess of statutory jurisdiction * * *;
"(D) without observance of procedure required by law;
"(E) unsupported by substantial evidence * * *;
"* * * * * *."

which has been expressly disapproved by the agency ought then to be subject to antitrust remedies supplemental to those which could have been granted by the agency.

A contrary decision would not only be an unsound reading of legislative intent, but would also be impractical. It would foreclose from the courts the option of utilizing primary jurisdiction, a technique which does not preclude a later judicial antitrust proceeding should the agency first determine that the complained-of acts were not immunized. *Cf. Ricci v. Chicago Mercantile Exchange*, 409 U.S. at 305-06; *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 498-99 (1958). Greyhound's reading of Section 5(11) would place upon the I.C.C. the impossible burden of anticipating and ruling upon all the possible antitrust implications of all conduct conceivably related to any transaction subject to I.C.C. approval at the risk of subsequently being held to have conferred a blanket antitrust immunity.

In my other rulings, and in rejecting various proposed instructions, I tried to state my reasons as the case progressed. Accordingly, I will not extend this Memorandum by repeating those reasons here.

IT IS ORDERED:

(1) The motion for judgment notwithstanding the verdict is denied;

(2) The motion for a new trial is denied;

(3) The court will hear counsel on the matter of attorney's fees at 10:00 a.m., December 14, 1973.

DATED this 29th day of November, 1973.

/s/ ALFRED T. GOODWIN
Alfred T. Goodwin
United States Circuit Judge,
sitting as District Judge
by designation.

Appendix D

District Court's Memorandum and Order re Attorneys Fees

In the United States District Court
for the District of Oregon
Civ. No. 68-374

Mt. Hood Stages, Inc., doing business as Pacific Trailways,
Plaintiff,

v.

The Greyhound Corporation and Greyhound Lines, Inc.,
Defendants.

[December 21, 1973]

MEMORANDUM AND ORDER ON ATTORNEY FEES

After reviewing the file, the exhibits offered in support of the claim for attorney fees, and all the evidence offered by both parties on the question of a reasonable attorney fee, I have concluded that compensation at an hourly rate would be inadequate in a case of this kind.

I have considered all of the factors Judge Hamley enumerated in *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964), and have given weight to all of them. I believe that this case is, in many ways, unusual, and that its complexity and difficulty set it apart from the common run of antitrust cases, if such a category in fact exists.

I will not attempt to go through the figures, or the evaluation process, by assigning cash value to the various elements. Rather, I have decided to give substantial effect to the result achieved, and to the other factors in the perspective of the four years I have known the case in all its details. I have concluded that a

reasonable fee to be assessed against the defendant is the sum of $1,250,000. The attorney's fee is to bear interest at the statutory rate for judgments until paid.

The Clerk will draw and submit for my signature a final judgment, accordingly in the total sum of $14,396,090.00, plus costs to be taxed.

/s/ ALFRED T. GOODWIN
United States Circuit Judge,
sitting as District Judge
by designation.

Appendix E

Statutes Involved

Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5, provides in relevant part as follows:

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) or paragraph (3) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; . . .

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a

public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: . . .

(10) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (8), of this section, as it may deem necessary or appropriate.

(12) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of

law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. . . .

Section 4B of the Clayton Act, 15 U.S.C. § 15b, provides as follows:

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

Section 5 of the Clayton Act, 15 U.S.C. §§ 16(a), (i), provides in relevant part as follows:

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

* * * *

(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said

proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

Appendix F

Excerpts From CCH Trade Regulation Reports, Number 285 PT. I, pp. 8-10 (June 13, 1977).

AIRLINES

TRANSATLANTIC NO-FRILLS—Justice view . . . Laker Airways' proposed transatlantic "Skytrain" service should be approved without delay, the Department of Justice told the Civil Aeronautics Board.

* * * *

. . . The Department supported a consolidated proceeding to consider the applications of U. S. carriers to provide a low-fare, no-frills transatlantic service competitive to that offered by Laker, it said . . . .

While acknowledging that some type of consolidated and expedited proceeding is required, the Department opposes delaying the processing of Laker's application until resolution of the consolidated proceeding: "There is no reason to deprive U. S. passengers of immediate benefits of a creative, low-cost air service simply to accommodate U. S. carriers" (Statement of Position of U. S. Department of Justice, June 6, 1977, *Agreements Among Members of the International Air Transport Assn.*, CAB Dkt. No. 28672).

TRAVEL AGENT COMMISSION PACT—Justice view . . . Proposed International Air Transport Association agreements to fix the commissions earned by travel agents on sales of international airline tickets should be disapproved, the Department of Justice advised the Civil Aeronautics Board.

The Department's views were filed by the Antitrust Division with the Board after hearings on the matter. The hearings confirmed the Division's previously expressed view that approval of the agreements would not be in the public interest, according to Joe Sims of the Antitrust Division.

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(Consolidated Answer of the U. S. Department of Justice, June 6, 1977, CAB Dkt. Nos. 30927, 25908, 25427, 25457, 30912 and 30917).

INTERCITY BUSES

LATIN EXPRESS—Justice view on denial of application . . . Denial to a small bus company of authority to provide new intercity service incurred competition policy protests from the Department of Justice.

This was the second time in two months that such an application was rejected by the Interstate Commerce Commission and, in each case, denial was premised on the potential harm that the new service could have on Greyhound and Trailways bus operations, according to the Department's June 6 announcement.

The Department said its comments were in a petition filed by the Antitrust Division supporting the application of Latin Express Service, Inc., to operate new service between Miami, Florida, and Union City, New Jersey. . . .

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RAIL/WATER

ALASKA RATE FIXING—Justice view . . . Reject a rate-fixing agreement filed by the Alaska Rail-Water Association, the Department of Justice stated to the Interstate Commerce Commission.

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The Association is asking the Commission to approve an agreement by its members to fix rates for through routes between continental United States and Alaska; approval, if lawful, would immunize Association members from antitrust liability for rate-fixing, according to the Department's Antitrust Division. It told the ICC that the proposed agreement would eliminate com-

petition for rail-water movements on these routes and was beyond the Commission's authority to approve because the Railroad Revitalization and Regulatory Reform Act of 1976 limits Commission authority to immunize rate-fixing agreements from antitrust prosecution. . . .

TELEVISION

FCC NETWORK INQUIRY—Justice view . . . Listing a number of national television network contractual and advertising practices that it believes should be given special attention, the Department of Justice recommended procedures to expedite a Federal Communications Commission inquiry into practices of television networks and suggested measures to ensure effective participation by all interested parties.

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The comments were filed to help the Commission identify practices that may deter competition in television broadcasting, Joe Sims said, adding that the recommended procedures should help the inquiry explore fully all network-affiliate relationships and should guarantee prompt availability of a complete record to the full Commission (Motion of U. S. Department of Justice for Leave to File Late Comments, June 8, 1977, *Commercial Television Network Practices and the Ability of Station Licenses to Serve the Public Interest,* FCC Dkt. No. 21049 RM-2749).